Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

W. S. McBEATH,

Petitioner,

v.

STEVE C. COOPER and RICHARD L. WILSON,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONER

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

ANN KRAATZ
Assistant Attorney General
Chief, Law Enforcement Defense Division

*W. REED LOCKHOOF
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* Counsel of Record

88pp

QUESTIONS PRESENTED

The question of whether the citizenship and residency provisions enacted to combat the perceived evils of an unrestricted traffic in alcoholic beverages in the absence of express federal policies are a proper exercise of a power expressly conferred upon the states by the Tenth and Twenty-first Amendments to the United States Constitution represents an important question where this liquor regulatory system is neither novel nor unique when seventeen other states utilize similar residency provisions within their comprehensive liquor regulations, and

Whether the opinions and judgments of the federal district court and Court of Appeals for the Fifth Circuit are unprecedented and are in conflict with over fifty eight years of this Court's precedent concerning the relationship between the Twenty-first Amendment and the dormant Commerce clause and in conflict with over 100 years of this Court's precedent concerning a state's police powers to regulate the sale of liquor within its borders.

LIST OF PARTIES

Petitioner from Judgment Below[1]

W. S. McBeath, as Administrator of the Texas Alcoholic Beverage Commission.

Respondents

Richard L. Wilson
Steve C. Cooper

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[1] Wholesale Beer Distributors, Inc., Licensed Beverage Distributors Association, Inc., and Texas Package Stores Association, Inc., Defendants-Intervenors in the court below, do not desire to proceed with litigation of their claims herein.

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I. In the absence of express federal policies the citizenship and residency provisions enacted within a comprehensive system for the intrastate sale and distribution of liquor within its borders to combat the perceived evils of an unrestricted traffic in alcoholic beverages are a proper exercise of a power expressly conferred upon the states by the Tenth and Twenty-first Amendments to the United States Constitution. This regulatory system is neither novel nor unique since seventeen other states utilize similar residency provisions within their comprehensive liquor regulations. The opinions and

judgments of the federal district court and Court of Appeals for the Fifth Circuit are unprecedented, and are in conflict with over fifty-eight years of this Court's precedent concerning the relationship between the Twenty-first Amendment and the dormant Commerce Clause and in conflict with over one hundred years of this Court's precedent concerning a state's police powers to regulate the sale of liquor within its borders. 6

A. The standard of review for challenging state liquor regulations begins under the Twenty-first Amendment to the Constitution. 7

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BRIEF FOR PETITIONER

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

NOW COMES Petitioner herein and prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that court's January 13, 1994, Judgment and Opinion in this proceeding.

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered January 13, 1994, and from which review is sought, are reported at 11 F.3d 547 (5th Cir. 1994), and are attached in the Appendix to this Petition at page A-1.

The Judgment and Memorandum Opinion of the United States District Court for the Western District of Texas entered June 13, 1991, and from which Petitioner appealed is not reported and is attached at page B-1.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is sought on January 13, 1994. Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

This case arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, and the Questions Presented involve sections 11.46(a)(11), 11.61(b)(19), 28.04, and 109.53[1] of the Texas Alcoholic Beverage Code (Vernon 1989) plus § 6.03 Texas Alcoholic Beverage Code (Vernons 1994); the tenth amendment and twenty-first amendment of the United States Constitution; the commerce clause, art. 1 § 8 cl. 3 and the privileges and immunities clause, art. IV, § 2, of the United States Constitution; 27 U.S.C. 121; and 27 U.S.C. 122. These relevant state statutes, constitutional amendments, constitutional clauses, and federal statutes are reprinted in the Appendix to this Petition at page C-1.

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[1] All sections as they existed in 1990 have been amended in part as reflected in the Appendix.

STATEMENT OF THE CASE

The pertinent facts of this "brewing" controversy are straightforward.[2] Richard L. Wilson and Steve C. Cooper are residents of Florida and Tennessee, respectively. Together, they seek to own and operate a topless nightclub in San Antonio called Baby Dolls, which is operated by K.S. Enterprises, Inc. ("KSE"), a Texas corporation holding a mixed beverage permit (which allows the operation of an open saloon) issued by the Texas Alcoholic Beverage Commission ("TABC" or "Commission"). Toward this end, Wilson and Cooper established Bexar County Enterprises, Inc. ("BCE"), a Tennessee corporation wholly owned by Wilson and Cooper.

In August, 1990, BCE purchased 49% of KSE's stock and acquired an option to purchase the remaining shares whenever the legality of the transaction under the Code could be established (*i.e.*, whenever the transfer could occur without jeopardizing the liquor permit held by KSE). Apparently, BCE later transferred its KSE stock and the option to purchase the remaining shares to Wilson and Cooper, individually.[3] The remaining KSE shares are held in escrow, and are to be transferred to plaintiffs whenever the permit is free from threat of revocation.

The instant dispute arose because several provisions of the Texas Alcoholic Beverage Code ("Code") require a sustained period of Texas citizenship and/or residency before the Commission can issue a mixed beverage permit. Wilson and Cooper, as non-Texas residents, were deemed per se ineligible under Texas law to become the majority (51%) stockholders in a Texas corporation holding a mixed beverage permit. Cooper

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2 This statement of the case basically mirrors the "Facts and Prior Proceedings" from the Fifth Circuit's opinion in *Cooper v. McBeath*, 11 F.3d 547, 549-50.

3 At oral argument, it was claimed by Wilson and Cooper that BCE no longer exists.

and Wilson filed summary judgment proof in the form of affidavits that they have no intention of ever residing in Texas.

The challenged Code provisions at that time provided:

* Section 11.46(a)(11) allows the TABC to refuse a permit to any applicant who has not been a Texas citizen for the three years immediately preceding his permit application.[4]

* Section 11.61(b)(19) allows the TABC to cancel a permit upon finding that the permittee was not a Texas citizen for the three years immediately preceding his permit application.[5]

* Section 28.04, relating to changes in corporate control, forbids renewal of a mixed beverage permit if there has been a change of ownership of over 50% of the corporate stock, unless the transferee is "qualified" to hold the permit.

* Section 109.53, located in the Code's regulatory and penal provisions, states unequivocally that "[n]o person who has not been a citizen of Texas for a period of three years immediately preceding the filing of his application therefor shall be eligible to receive a permit under this code."

Section 109.53 also includes what is commonly known as the "51 percent rule," which forbids the issuance of a permit to any corporation "unless at least 51 percent of the stock of the corporation is owned at all times by citizens who have resided within the state for a period of three years[.]" Any corporation

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[4] "Applicant" is defined in § 11.45 to include the owners of a majority of the corporate stock.

[5] "Permittee" is defined in § 11.61(a) to include the owners of a majority of a corporation's stock.

holding a permit in violation of this section risks the forfeiture of its corporate charter.

Under these Code provisions, consummation of the contemplated sale of KSE's remaining shares would have required the Commission to revoke KSE's permit. Accordingly, Wilson and Cooper filed suit in federal district court seeking declaratory and injunctive relief against these provisions, which, they contend, violate the Privileges and Immunities Clause found in Art. 4, § 2 of the U.S. Constitution and the Commerce Clause prohibiting any person from owning a majority ownership in a permit-holding corporation unless that person has satisfied Texas' three-year durational residency and citizenship requirement. Wilson and Cooper alleged that the provisions were enacted for the sole purpose of economic protectionism. The case was presented to the district court. by Cooper and Wilson filing a motion for summary judgment and Petitioner filing a cross-motion for summary judgment. After first finding that Wilson and Cooper possessed standing to assert their claims and that their action was ripe for adjudication, the district court declared the four Code provisions unconstitutional under both doctrines and enjoined their enforcement on June 13, 1991. The Petitioner, W. S. McBeath as Administrator of the TABC and other various private, Texas-based liquor interests acting as Intervenors-Defendants, timely appealed.

On June 19, 1993, 73 days after oral argument in this case before the Fifth Circuit, the Governor of Texas signed H.B. 1445 into law. H.B. 1445, whose relevant provisions became effective September 1, amended the Code in several respects. Most important for purposes of this petition, the Texas Legislature set out its reasons for the three year citizenship and residency requirements and amended the three year requirement to a one year requirement. § 6.03(a) thru (j) Texas Alcoholic Beverage Code (Vernon's Supp. 1994). (See Appendix page __). This was the first written pronouncement by the Texas

Legislature about the reasons for the three year citizenship and residency provisions since they were originally enacted in 1935.[6]

The Fifth Circuit rendered its decision on January 13, 1994, affirming the decision of the district court on the basis that the citizenship and residency provisions violated the "dormant" Commerce Clause. Since the Fifth Circuit disposed of this case on Commerce Clause grounds, they elected not to address Cooper's and Wilson's alternative argument, that the challenged statutes breach the privileges and immunities clause of Art. IV, § 2.

The present Petition for Writ of Certiorari followed.

Reasons For Granting The Writ

I. In the absence of express federal policies the citizenship and residency provisions enacted within a comprehensive system for the intrastate sale and distribution of liquor within its borders to combat the perceived evils of an unrestricted traffic in alcoholic beverages are a proper exercise of a power expressly conferred upon the states by the Tenth and Twenty-first Amendments to the United States Constitution. This regulatory system is neither novel nor unique since seventeen other states utilize similar residency provisions within their comprehensive liquor regulations. The opinions and judgments of the federal district court and Court of Appeals for the Fifth Circuit are unprecedented, and are in conflict with over fifty-eight years of this Court's precedent concerning the relationship between the Twenty-first Amendment and the dormant Commerce Clause and in conflict with over one hundred years of this Court's precedent concerning a state's police powers to regulate the sale of liquor within its borders.

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[6] The Legislature in 1935 enacted a provision which still exists today in § 1.03 that enunciated the Code's public policy which states "this code is an exercise of the police power of the state for the protection of the welfare, health, peace, temperance, and safety of the people of the state. It shall be liberally construed to accomplish this purpose."

A. The standard of review for challenging state liquor regulations begins under the Twenty-first Amendment to the Constitution.

The Twenty-first Amendment "is unique in its constitutional scheme in that it represents the only express grant of power to the states thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product -- intoxicating liquors." *Castlewood Int'l Corp. v. Simon*, 596 F.2d 638, 642 (5th Cir.), *vacated*, 446 U.S. 949, 100 S.Ct. 2914 (1979), *on remand*, 626 F.2d 1200 (5th Cir. 1980). "Thus, there has been a constitutional adjustment in the allocation of authority between the federal and state governments in matters touching on alcoholic beverage control. 'The Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce. Though the precise amount of power it has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: local, not national, regulation of the liquor traffic is now the general Constitutional policy.'" Lawrence H. Tribe: American Constitutional Law, "The Effect of the Twenty-first Amendment on the Operation of the Commerce Clause," § 6-24 page, 475 (1988).

Two systems of state liquor regulation evolved after the ratification of the Twenty-first Amendment. Currently, sixteen states are "control states" which permit only state-owned stores to make liquor sales. The remaining thirty-four states are "license states" which permit state-licensed, privately owned businesses to make liquor sales. Distilled Spirits Council of the United States, Inc., "Summary of State Laws & Regulations Relating to Distilled Spirits" 27 Ed. 1991. Of the thirty-four license states, eighteen impose a residency requirement on the licensee, thereby excluding out-of-state residents from holding a license to sell intoxicating liquors.[7]

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[7] The following states have residency requirements enacted within a comprehensive regulatory scheme to control the intrastate sale of

In 1990, this Court affirmed the well-settled view that when determining the validity of a state liquor regulatory scheme, the proper analysis begins under the Twenty-first Amendment. *North Dakota v. United States*, __U.S.__, 110 S.Ct. 1986 (1990).[8] The Court acknowledged and confirmed that the states have virtually complete control over both the importation and sale of liquor and the structure of the liquor distribution system. *Id.*, 110 S.Ct. at 1992.[9]

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intoxicating liquor: Alaska, ALASKA STAT. § 4.11.390 (1986); Arizona, ARIZ. REV. STAT. ANN. § 4.202 (1956 & Supp. 1993); Arkansas, ARK. STAT. ANN. § 3-9.305 (1989 & Supp. 1993), ARK. STAT. ANN. § 3.-5.302 (1989 & Supp. 1993); Georgia, GA. CODE ANN. § 3-4.23 (1990), GA. CODE ANN. § 3.5-40 (1990); Indiana, IND. CODE § 7.1-3-21.3 (1982); Kansas KAN. STAT. ANN § 41-311a (1993); Kentucky, KY. REV. STAT. ANN. § 243.100 (1981); Louisiana, LA. REV. STAT. ANN. § 26.280 (West 1989 & Supp 1994); Maryland, MD. CODE ANN., ALCO. BEV. 2B7 (1989), MD. CODE ANN., ALCO. BEV. 2B57 (1989); Massachusetts, MASS. GEN. LAWS ANN. ch. 138 § 18 (West 1991); Missouri, MO. ANN. STAT. § 311.060 (Vernon 1959 & Supp. 1993); Nebraska, NEB. REV. STAT. § 53425 (1943 & Supp. 1993); North Dakota, N.D. CENT. CODE § 5.03.01 (1987 & Supp. 1993), N.D. CENT. CODE § 5.02.02 (1989 & Supp. 1993); Oklahoma, OKLA. STAT. ANN. til. 37, § 527 (1990 & Supp. 1994); Rhode Island, R.I. GEN. LAWS § 3.5.10 (1956); South Carolina, S.C. CODE ANN. §61.3.420 (1976 & Supp. 1993); Wisconsin, WIS. STAT. ANN. § 125.04 (West 1989 & Supp. 1993).

[8] "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment. . . ." *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 41, 86 S.Ct. 1254, 1259 (1966).

[9] It seems noteworthy that this Court in *North Dakota*. Furthermore, this Court recognized that part of *North Dakota's* comprehensive regulatory scheme for regulating intoxicating liquors had residency restrictions but still found said scheme unquestionably legitimate. *North Dakota*, 100 S.Ct. at 1990-91 ("Under the State's regulatory system, there are three levels of liquor distributors: out-of-state distillers, suppliers, state licensed wholesalers, and state licensed retailers.") and at 1997 ("All other liquor retailers are required to purchase from state-licensed wholesalers, who are legally bound to comply with this state's liquor distribution system.") (Scalia, J. concurring) at 2001 ("The Twenty-first Amendment, which prohibits 'the transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof,' is binding on the Federal Government like everyone else, and empowers *North*

Petitioner presented uncontroverted summary judgment evidence to the district court demonstrating that Texas established in the Code a comprehensive regulatory scheme for the distribution of liquor within its borders in the interest of promoting health, safety, welfare, morals, and temperance. This form of a comprehensive system (regulating solely the intrastate sale of alcohol to the ultimate consumer) is unquestionably legitimate. *Id.*, 110 S.Ct. at 1993. "Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity." *Id.*, 110 S.Ct. at 1994 (referring to *Capitol Cities v. Crisp*, 476 U.S. 691, 714, 104 S.Ct. 2694, 2708 (1984)). "The State has an unquestionable interest in the liquor traffic that occurs within its borders. *Rice v. Rehmer*, 463 U.S. 713, 724, 163 S.Ct. 3291, 3298 (1983).

Neither the district court nor the Fifth Circuit used the proper analysis set out by *Joseph E. Seagram & Sons v. Hostetter*, 86 S.Ct. at 1259 and utilized in *North Dakota v. U.S.* As a result neither the district court nor the Fifth Circuit approached this case from the position that Texas' state liquor control policies are supported by a strong presumption of validity and should not be set aside lightly.

To have a proper understanding of the significance of § 2 of the Twenty-first Amendment in this litigation, please note the issues this case does not raise. This is not a case involving the relation between § 2 and Congress's authority to legislate under the positive Commerce Clause. *See Capitol Cities v. Crisp*, 476 U.S. 691, 104 S.Ct. 2694 (1984); *California Retail Liquor Dealer's Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980); *Hostetter v. Idlewild Bon Voyage Liquor*

Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.") cited *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 57 S.Ct. 77 (1936) as being good authority two times in the said opinion. *North Dakota*, 110 S.Ct. at 1992 and 1993. If *Young's Market Co.*, is still the law of the land then Texas has not violated the "negative or dormant" commerce clause.

Corp., 377 U.S. 324, 84 S.Ct. 1293 (1964). These three cases were essentially Supremacy Clause cases, confirming that the Twenty-first Amendment had not repealed the commerce clause. *Capital Cities*, 467 U.S. at 712-13, 104 S.Ct. at 2707; *Midcal*, 445 U.S. at 108-09, 100 S.Ct. at 944-45; *Idlewild*, 377 U.S. at 331-32, 84 S.Ct. at 1298. This is not a case where Texas' comprehensive regulatory scheme has impaired interstate commerce that merely passes through the State,[10] or that is destined to terminate at a federal enclave within the State.[11] Nor is there a claim of a due process violation,[12] nor a claim involving equal protection,[13] nor a claim of an effect on liquor prices outside the state.[14]

Both the district court and the Fifth Circuit based their decisions in the present case in large part on *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263, 104 S.Ct. 3049 (1984). Although precedential, it should be remembered that the holding in *Bacchus* should only apply to another case containing the same set of operative facts. Furthermore, there was a strongly worded dissent by Justice Stevens[15] criticizing the majority's reasoning. The rationale underlying Stevens' dissent was echoed by Justice O'Connor in her dissenting opinions in 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 352-360, __S.Ct.__, __ (1986)[16] and *James B. Beam Distilling Co. v. Georgia*, __U.S.__, 111 S.Ct. 2439, 2451-56 (1991).[17] These strongly written dissents show that *Bacchus* is flawed in its reasoning and that its reliance on *Capitol Cities, Midcal Aluminum*, and *Idlewild* is misplaced.

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10 *See Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247 (1964).

11 *See Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009 (1938).

12 *See Wisconsin v. Constantinum*, 400 U.S. 433, 91 S.Ct. 507 (1971).

13 *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976).

14 *Healy v. Beer Institute, Inc.*, __U.S.__, 109 S.Ct. 2491 (1989).

15 Chief Justice Rehnquist and Justice O'Connor joined in the dissent.

16 Chief Justice Rehnquist joined in the dissent.

17 Chief Justice Rehnquist and Justice Kennedy joined in the dissent.

Bacchus considered a Hawaii excise tax on alcohol sales that exempted okolehao, a brandy, and pineapple wine which were locally produced in said state. Hawaii did not seek to justify this tax on the ground that it was enacted to combat the perceived evils of an unrestricted traffic in alcohol or to carry out any other purpose of the Twenty-first Amendment. *Bacchus, supra,* 104 S.Ct. at 3058. Justice White who wrote the majority opinion in *Bacchus* noted that Hawaii expressly disclaimed any reliance upon the Twenty-first Amendment in the court below and did not cite it in its motion to dismiss or affirm. It was not until it prepared its brief on the merits in this Court that it became "clear" to the State that the Amendment saves the challenged tax. *Id.,* 104 S.Ct. 3056-57 n. 12. It was also acknowledged in the State's brief that Hawaii's purpose was "to promote a local industry." *Id.,* 104 S.Ct. 3058. "Consequently because the tax violates a central tenet of the [dormant] Commerce clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's belated claim based on the Amendment." *Id.,* 104 S.Ct. at 3058.

Under the facts in this case, the challenged statutory provisions directly regulate a Texas corporation holding a mixed beverage permit.[18] They are targeted solely at the intrastate retail distribution of intoxicating liquors for on premise consumption.

In the case at bar, petitioner expressly denied that the purpose of these provisions was economic protectionism. Petitioner presented uncontroverted summary judgment

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18 Curiously, although the Fifth Circuit struck the residency requirement as unconstitutional , it also made reference, with seeming approval, to Texas law that "denies applications [for retail licenses] to corporations not organized under the laws of Texas" and to the fact that such corporations face revocation of their permits and other sanctions for violations of Texas law. *Cooper v. McBeath,* 11 F.2d at 554. The residency requirements and the requirement that a corporate permittee be organized under Texas law serve similar purposes. If the latter requirement is constitutional, as the Fifth Circuit's opinion suggests, the former requirements plainly are constitutional as well.

evidence that the citizenship and residency provisions regulating a Texas corporation's ability to qualify for a mixed beverage permit serve as a legitimate tool to protect the health, safety, welfare, morals, and temperance of the people of Texas. The purpose of the summary judgment evidence was to specifically show that the challenged statutory provisions fell within the central purpose (the core powers) of § 2 of the Twenty-first Amendment.[19] Respondents presented no summary judgment evidence on the issue of economic protectionism. In addition, the Texas Supreme Court in *De Grazier v. Stephens*, 191 Tex. 194, 105 S.W. 992, 993-94 (1907), had earlier ruled that a citizenship and residency requirement similar to the one in this case was a constitutional exercise of the state's power to help protect the health, safety, welfare, moral, and temperance of the people of Texas.[20] *De Grazier* reasoned that the statute is "not a mere guise to erode the effect of the constitutional provisions under consideration; but that it is calculated to promote the object of the act in substantial respects." *Id.*, 105 S.W. at 994; *See also Coolman v. Robinson*, 452 F.Supp. 324 (N.D.Ind. 1978) (citizenship and residency requirements are legitimate exercise of a state's right to structure liquor system to protect health, safety, and welfare of the people). *Coolman* appears to be the only other reported case dealing with citizenship and residency provisions enacted pursuant to a state's police power and § 2 of the Twenty-first Amendment.[21]

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[19] Petitioner submits that the "core § 2 power" test for a state when analyzing a Twenty-first Amendment case only applies when the state statute conflicts with express federal policies enacted under the positive Commerce Clause. *Capitol Cities*, 104 S.Ct. at 2707 ("... we have held that when a state has not attempted directly to regulate the sale or use of liquor within its borders -- the core § 2 power -- a conflicting exercise of federal authority may prevail").

[20] This Court gives great weight to the views of the State's highest court on state law matters and customarily accepts the findings of state courts in the absence of exceptional circumstances. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 729 (1987).

[21] *See De Grazier* at 994 citing several other States' Supreme Court cases upholding residency requirements to qualify for a license to sell intoxicating cases prior to the enactment of § 2. This court affirmed

Bacchus in nearly all particulars is distinguishable from Petitioner's case. The Fifth Circuit in the present case simply found as a matter of law that the Texas statutes are for the sole purpose of economic protectionism by relying on the traditional analysis used in dormant (negative) commerce clause cases like *Wyoming v. Oklahoma*, __U.S.__, 112 S.Ct. 789 (1992); *Dennis v. Higgins*, __U.S.__, 111 S.Ct. 865 (1991); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 108 S.Ct. 1803 (1988); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 1002 S.Ct. 2009 (1980); and *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727 (1979). Both the district court and the Fifth circuit misperceived the proper analysis (which starts with § 2 of the Twenty-first Amendment).[22] As a result, they also misperceived Petitioner's uncontroverted summary judgment evidence which was presented for the purpose of showing that the challenged provisions were enacted to protect the health, safety, welfare, morals, and temperance of the people (which are so closely related to the powers reserved by § 2 that the regulation may prevail, notwithstanding that its requirements would normally conflict with the dormant commerce clause)[23]

Because the Fifth Circuit did not begin its consideration of the challenged statutory provisions under the Twenty-first Amendment, it ignored the Petitioner's uncontroverted summary judgment evidence; the case law submitted by Petitioner; and the stated reasons for the citizenship and residency provision as set

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without a written opinion one of those cases. *Mette v. McGuekin*, 18 Neb. 324, 25 N.W. 338 (1885) *aff'd without opinion*, 149 U.S. 781, 13 S.Ct. 1050 (1892).

22 *North Dakota, supra* 110 S.Ct. 1986; *Joseph E. Seagram & Sons v. Hostetter*, 86 S.Ct. at 1259.

23 *Capitol Cities v. Crisp, supra*, 104 S.Ct. 2694, 2708 (the above parenthetical statement is a paraphrase of *Capitol Cities* because the said case was really a Supremacy Clause case that dealt with express federal policies). See §6.03(a)-(i) Texas Alcoholic Beverage Code (Appendix page __) wherein the Texas Legislature explains the necessity for the citizenship and residency requirements

out in § 6.03(a)-(i) Tex. Al. Bev. Code Ann. (Vernons 1994).[24] As a result the Fifth Circuit did not follow this Court's precedent concerning the granting of summary judgment.

Rule 56(c) provides that summary judgment shall be rendered if there is no "genuine issue as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c), by its very terms permits summary judgment even if the parties disagree as to some facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510 (1986). To be entitled to summary judgment as a matter of law, a defendant need not refute the plaintiff's claims, but need only show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986); *accord Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986).

In this case, Respondents alleged the purpose of the challenged statutes is economic protectionism but they offered no summary judgment evidence to support the said allegation. Also, Respondents did not offer any evidence to controvert defendant's summary judgment evidence. Thus, a Petitioner is entitled to summary judgment when a plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [the plaintiff's] case, and on which [the plaintiff] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2553; *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 475, 586-87, 106 S.Ct. 1348, 1356

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[24] Please note the Fifth Circuit expressly found that the citizenship and residency provision were not enacted in 1935 for an economic protectionist purpose. *Cooper v. McBeath*, 11 F.3d at 553 ("Because the 51 percent ownership requirement, the crux of the dispute, was enacted immediately after the repeal of the Eighteenth Amendment it cannot fairly be viewed as protectionist in its original intent since no local liquor industry then existed in Texas."). If the Fifth Circuit had been analyzing this case as a Twenty-first amendment case that finding should have been enough for Petitioner to prevail especially in light of §6.03(a)-(i). Tex. Alco. Bev. Code Ann. (Vernon 1994).

(1986) (the burden is not on the moving party to produce evidence showing the absence of a genuine issue of material fact).

Absent any evidence by the Respondent in their motion for summary judgment to establish that the citizenship and residency provisions were not enacted to combat the perceived evils of an unrestricted traffic in alcoholic beverages, the Fifth Circuit erred when it failed to follow this Court's precedent and to render a decision that the challenged provisions are a proper exercise of a power expressly conferred upon the states by the Tenth and Twenty-first Amendments.

B. The district court and the Fifth Circuit erred in failing to realize that the commerce clause is not dormant with respect to the regulation of a single product -- intoxicating liquors -- and has not been since 1913 when the Webb-Kenyon Act was passed by Congress. Furthermore, both courts failed to understand the clear intent of Congress in constitutionalizing the basic language of Webb-Kenyon in § 2.

A proper analysis of § 2 of the Twenty-first Amendment and the Commerce Clause should begin with a recognition that § 2 created an exception to the normal operation of the "dormant"[25] commerce clause. *Capitol Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2707 (". . . [t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause."). This Court has explained that "§ 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that absent the Amendment, would clearly be invalid under the [dormant] Commerce clause." *Hostetter v. Idlewild Bon Voyage*

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25 It is well settled that the Commerce Clause contains a "dormant" facet that serves as "a substantive restriction on permissible state regulation of interstate commerce." *Oregon Waste System, Inc., et al. v. Department of Environmental Quality of the State of Oregon, et al.*, __U.S.__, __S.Ct.__, 1994 W.L. 107427 (U.S.Or. April 4, 1994); *Dennis v. Higgins*, 111 S.Ct. at 865, 870.

Liquor Corp., 84 S.Ct. at 1296. Aside from *Bacchus* this Court has never ruled that the "dormant" commerce clause has the ability to trump state statutes enacted under § 2. As shown by the dissents in *Bacchus*, 104 S.Ct. at 3059-3064; *Duffy*, 107 S.Ct. at 730-34 and *James B. Beam v. Georgia*, 111 S.Ct. at 2453-56, the cases which the majority in Bacchus relies upon dealt with an issue involving a state's authority to regulate the sale and distribution of alcohol under § 2 when doing so conflicts directly with legislation passed by Congress pursuant to its powers under the positive commerce clause (*i.e.* express federal policies).

Since there are no express federal policies conflicting with the challenged statutory provisions in this case, the question is whether the "dormant" commerce clause constrains a state's authority to regulate the intrastate sale and distribution of intoxicating liquors solely within a state's borders pursuant to § 2.. Petitioner respectfully submits that the answer is no.[26]

The commerce clause has not been fully or completely "dormant" in its ability to restrict a state's right to regulate the interstate commerce of intoxicating liquors since 1890. Wilson Act (Act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases), 26 Stat. 313 (1890), 27 U.S.C. § 121 (1994). Congress was not finished, however, and in 1913 decided to regulate interstate commerce by removing all immunities of liquor in interstate commerce. Webb Kenyon Act (Act divesting intoxicating liquors of their interstate character in certain cases), 37 Stat. 699 (1913), 27 US.C. § 122 (1994) (re-enacted without change, 49 Stat. 877 (1935)). The Webb-Kenyon Act was held constitutional by this Court in 1917. *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 37 S.Ct. 180 (1917) (The Court also provides an analysis that led to the enactment of the Webb-Kenyon Act. *Id.*, 37 S.Ct. at 184). These Acts are

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[26] Note, this Court in *Capitol Cities*, 104 S.Ct. at 2707 cites *Young's Market*, 57 S.Ct. at 78-79 with approval.

the positive and primary legislation by Congress giving the states a free hand in regulating the sale and distribution of intoxicating liquors within their borders by removing the restrictions of the commerce clause on any state's right to do so. These Acts are still in effect today and should not be ignored.

Congress in point of fact re-enacted the Webb-Kenyon Act without change in 1935 along with the Federal Alcohol Administration Act, 27 U.S.C. § 201-219a. These are the only two positive acts by Congress relating to intoxicating liquors since the ratification of § 2 in 1933.

One of the specific purposes of the Federal alcohol Administration Act was to help enforce the Twenty-first Amendment. *Id.* at § 203 ("In order effectively to . . . enforce the twenty-first amendment. . . .") and § 204(d) ("A basic permit shall be conditioned upon compliance with the twenty-first amendment and laws relating to the enforcement thereof. . . ."). This Act was enacted by Congress to regulate the interstate commerce of intoxicating liquors at the manufacturing and wholesale levels for basically the same reasons and concerns that the Texas Legislature enacted the citizenship and residency provisions within its comprehensive statutory scheme to regulate the intrastate sale of intoxicating liquors. *See National Distributing Co. v. U. S. Treasury Dept.*, 626 F.2d 997, 1005 (D.C. Cir. 1980) ("In the early days after the repeal of prohibition the nation was infested with bootleggers and racketeers anxious to continue their trade and willing to thwart the tax and health laws. . . . The House Report stated that 'many factors not common to other industries' - especially the presence of racketeers and the temptation to evade the tax laws by operating outside the legitimate channels - caused 'wide-spread violations and evasions of the liquor laws.") Compare § 6.03(a)-(i) Texas Alcoholic Beverage Code Ann. (Vernon 1994).[27]

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[27] In October, 1992, a D.C. circuit case that dealt with the Federal Alcohol Administration Act found that "[t]he agency properly placed substantial weight on the statute's recognition that the alcohol industry is unique. Both its historic association with corruption and the general belief

Just as Congress drafted the Wilson Act and the Webb-Kenyon Act, it also drafted the language of § 2 of the Twenty-first Amendment. Section 2 constitutionalized the basic language of the Webb-Kenyon Act. One of the debates within this Court since *Bacchus* centers around the obscurity of the legislative history in promulgating the language of § 2 and the scope of authority intended for § 2. This Court in *Bacchus*, 104 S.Ct. at 3057, and 324 *Liquor Corp. v. Duffy*, 107 S.Ct. at 727 n.10 found no clear demonstration of congressional intent. A careful examination of the congressional debate regarding § 2 shows clearly and forcefully that the intent of Congress in enacting § 2 was intended to return absolute control of the liquor trade to the states and that the federal government could not use its commerce clause powers to interfere in any manner with the states exercise of the power conferred by § 2. 76 Cong. Rec. 4138-4179 (1933); *Bacchus*, 104 S.Ct. 3059-64 (Stevens, J., dissenting); *Duffy*, 107 S.Ct. at 730-34.

Any objective reading of the Senate Committee's viewpoint, as reported by Senator Blaine, and the Senator's personal viewpoint shows they are essentially the same. Certainly, Justice Hugo Black,[28] a Senator during the creation of the twenty-first amendment, strongly believed that the legislative history should be enough to prove that when the Senators agreed to § 2 they thought they were returning "absolute control" of liquor traffic to the States, free of all restrictions which the dormant Commerce Clause might before that time have imposed. *Hostetter v. Idlewild Liquor Corp.*, 84 S.Ct. at 1301. (Black, J., dissenting); *United States v. Frankfort*

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that cheap and plentiful alcohol is not an unmitigated social good (as opposed, say, to cheap and plentiful home heating oil or shoes) suggest that the alcohol industry requires special oversight and regulation." *Fedway Associates v. U.S. Treasury*, 976 F.2d 1416, 1423 (D.C. Cir. 1992).

[28] 76 Cong. Rec. at 4177-78 (indicating that Justice Black was actively involved in the debate concerning the amendments adoption).

Distillers, 65 S.Ct. 661, 664-65 (1945) (Black, J., with Frankfurter, J., concurring).[29]

If § 2 did not exist and Congress were to repeal the Wilson Act and the Webb-Kenyon Act, the challenged statutory scheme would unquestionably, run afoul of the "dormant" Commerce clause. *See Leisy v. Harden*, 135 U.S. 100, 101 S.Ct. 681, (1890). Section 2 does exist, however, and it is beyond dispute that a constitutional amendment has greater weight and authority than mere congressional acts. Since the ratification of § 2 in 1933, Congress no longer has the authority to enact legislation under the authority of the commerce clause that would directly regulate the importation of intoxicating liquors into a state nor could it lawfully enact legislation on how the states structure their intrastate distribution system. Logically, the "dormant" commerce clause no longer applies to commerce within a state's borders with regard to intoxicating liquors which a state chooses to regulate pursuant to § 2. *Frankfort Distillers*, 65 S.Ct. at 665 (Frankfurter, J., concurring) (Prior to the enactment of § 2, the power of the state to control the liquor traffic was subordinate to the commerce clause. Section 2 reversed this legal situation by subordinating rights under the commerce clause to the power of a state to control, and to control effectively, the traffic in liquor within its borders).

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29 *See Idlewild*, 84 S.Ct. at 1300-01 for the legislative history that Justice Black discussed in his dissent.

C. The citizenship and residency provisions regulating a Texas corporation's ability to qualify for a permit to sell intoxicating liquors does not violate the privileges and immunities clause.

This Court has consistently recognized that engaging in the business of the sale of intoxicating liquors is an evil that has continually confronted local, state, and federal government. *Crane v. Campbell*, 245 U.S. 304, 38 S.Ct. 98, 99 (1917); *Crowley v. Christensen*, 137 U.S. 86, 91, 11 S.Ct. 13, 15 (1890). This Court prior to the adoption of § 2 of the Twenty-first Amendment had ruled there was no fundamental right or privilege under article IV § 2 to engage in the business of selling intoxicating liquors. *Cronin v. Adams*, 192 U.S. 108, 114-15, 24 S.Ct. 219, 220 (1904) (". . . right to sell liquor not a privilege of the state or United States"); *Crowley*, 11 S.Ct. at 15 ("There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States.")[30] It was well settled prior to 1933 (when § 2 became a part of the Constitution) that the states required no specific constitutional grant of authority to legislate with respect to matters traditionally within the scope of their police power. *Mugler v. Kansas*, 123 U.S. 623, 660-61, 8 S.Ct. 273, 296-97 (1887).

While the states have the discretionary right to regulate liquor sales extensively pursuant to the police power (Tenth Amendment U.S. Constitution), the broad sweep of the Twenty-first amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. *City of Newport, KY v. Iacobbucci*, 479 U.S. 92,

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30 In other cases concerning a fourteenth amendment challenge under the privileges or immunities clause, the Court has ruled that a citizen of this nation has no fundamental right to engage in the business of selling intoxicating liquors. *Giozza v. Tierman*, 148 U.S. 657, 13 S.Ct. 721 (1893); *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273 (1887); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 635 (1873).

107 S.Ct. 383, 385 (1986)(*citing California v. La Rue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395 (1972).[31]

The earlier cases of this Court (cited above) showing that the business of selling intoxicating liquors is not a privilege protected under the privileges and immunities clause of art. IV § 2 were basically ignored by the district court. The district court found that a statute which prohibits the practice of *any trade, business, commercial activity or occupation* based on residence violates the privileges and immunities clause. The district court cited *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272 (1985) (practice of law); *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482 (1978) (jobs related to state-owned oil and gas fields); *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156 (1948)(shrimp fisherman); and *Ward v. Maryland*, 79 U.S. (12 Wall.) 449 (1871) (merchants) for the proposition that the privileges and immunities clause protects any trade, business, commercial activity, or occupation. Not one of those cases just cited makes such a blanket statement nor do they even imply that art. IV, § 2 protects any trade, business, commercial activity, or occupation.

The district court ignored the case of *United Bldg. & Const. v. Mayor & Council of Camden*, 465 U.S. 208, 104 S.Ct. 1020 (1984) wherein the Court declined to identify the full range of activities implicated by the privileges and immunities clause and stated:

> [s]ome distinctions between residents and non-residents merely reflect the fact that this is a nation composed of individual states, and are

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31 ". . . previous decisions of this Court have established that in the context of liquor licensing, the [21st] Amendment confers broad regulatory powers on the states. *Iacobucci*, 107 S.Ct. at 385; *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715, 101 S.Ct. 2599, 2600 (1981) (per curiam) (". . . a state has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold.")

> permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the validity of the Nation as a single entity must the state treat all citizens, resident and non-resident, equally.

Id., 465 U.S. at 218, 104 S.Ct. 1027. In addition, the district court ignored the fact that the Court has already limited the holding in Piper to the practice of law. *Supreme Court of Virginia v. Friedman*, __U.S.__, 108 S.Ct. 2260, 2265 (1988).

The *Hicklin* case should not be used to support the district court's theory because *Hicklin* did not follow the analysis for a potential violation of the privileges and immunities clause as it was set out in *Baldwell v. Montana Game and Fish Commission*, 436 U.S. 371, 98 S.Ct. 1852 (1978), and subsequently followed in *Camden* and in *Piper*. *Ward* is not helpful to the district court's theory since it was decided in 1871 and in 1890 the Court in *Crowley* held that selling intoxicating liquors by retail is not a privilege of a citizen of the state.

The district court's statement "that the plaintiffs claimed the right to apply for a license to conduct their business of selling mixed beverages and to have that application considered on equal terms with residents of the State of Texas" is inaccurate under the undisputed facts in this case. The real party of interest has to be KSE, which holds the mixed beverage permit and is the legal entity being controlled under the challenged provisions. It is clearly established that corporations are not entitled to protection under the privileges and immunities clause. *Western Life Ins. Co. v. Board of Equalization of California*, 451 U.S. 648, 101 S.Ct. 2070, 2077 (1981). The district court allowed the plaintiffs to finesse the corporate claim of KSE around the limits of art. IV, § 2. This finesse is without merit and should be struck down. *Cf. North Dakota State Bd of Pharmacy v. Snyder's Drug Store, Inc.*, 414 U.S. 156, 166-67, 94 S.Ct. 407,

414 (1973)(state's authority to regulate corporate form of business through the use of residency provisions upheld where statute attempted to lessen suspicion of perceived corporate evil). It is clear the challenged provisions are designed to regulate the corporate form of engaging in the business of selling intoxicating liquors.

The right to engage solely in the intrastate sale of intoxicating liquors for on premise consumption is not a right which is important to the national economy or basic to the livelihood of the nation.[32] In fact, the enactment of § 2 recognizes the unique local interest and concerns of the sale of intoxicating liquors. Neither *Piper*, *Hicklin*, *Toomer*, or *Ward* involved the business of selling liquors, and it makes them inapplicable since the cases of the Court prior to the enactment of § 2 determined that engaging in the business of selling intoxicating liquors is *not* a fundamental right. Furthermore, each of the above said cases involved matters of interstate commercial concern, the regulation of which has *not* been specifically delegated to the states by the enactment of any constitutional amendments.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari issue to review the January 13, 1994, Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

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32 *Mette v. McGuckin*, 18 Neb. 323, 25 N.W. 338 (1885) *aff'd without opinion*, 149 U.S. 781, 13 S. Ct. 1050 (1892) ("From the earliest stages of our present civilization the sale of intoxicating liquors has been looked upon as a species of trade which was, or might be, injurious to the public weal; and hence it has at all times considered a proper subject of police regulation, not as affecting the commercial interests of the country but as affecting directly the welfare of the citizen and public morals.").

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DREW T. DURHAM
Deputy Attorney General for
Criminal Justice

ANN KRAATZ
Assistant Attorney General
Chief, Law Enforcement
Defense Division

*Counsel of Record

*W. REED LOCKHOOF
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080
Fax (512) 463-2084

ATTORNEYS FOR
PETITIONER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 91-8346

STEVE C. COOPER and
RICHARD L. WILSON,

Plaintiffs-Appellees,

versus

W. S. McBEATH,

Defendant-Appellant,

and

Licensed Beverage, Licensed Beverage
Distributors Association, Inc., et al.,

Intervenor-Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(A-90-CA-736)

Before REYNALDO G. GARZA and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The chief question in this case is whether certain portions of the Texas Alcoholic Beverage Code ("Code") violate the Commerce Clause and/or the Privileges and Immunities Clause of the United States Constitution. Finding that the dispute is not moot and that the plaintiffs possess ample standing to challenge the statutes, we determine that the Code's durational residency

and citizenship requirements amount to simple economic protectionism and therefore run afoul of the Commerce Clause. Moreover, the Twenty-first amendment provides no sanctuary for these parochial statutes. Accordingly, we affirm the district court's grant of summary judgment in favor of the plaintiffs.

FACTS AND PRIOR PROCEEDINGS

The pertinent facts of this "brewing" controversy are straightforward. Richard L. Wilson and Steve C. Cooper are residents of Florida and Tennessee, respectively. Together, they seek to own and operate a topless nightclub in San Antonio called Baby Dolls, which is operated by K.S. Enterprises, Inc. ("KSE"), a Texas corporation holding a mixed beverage permit issued by the Texas Alcoholic Beverage Commission ("TABC" or "Commission"). Toward this end, Wilson and Cooper established Bexar County Enterprises, Inc. ("BCE"), a Tennessee corporation wholly owned by Wilson and Cooper.

In September, 1990, BCE purchased 49% of KSE's stock and acquired an option to purchase the remaining shares whenever the legality of the transaction under the Code could be established (*i.e.*, whenever the transfer could occur without jeopardizing the liquor permit held by KSE). Apparently, BCE later transferred its KSE stock and the option to purchase the remaining shares to Wilson and Cooper, individually.[1] The remaining KSE shares are held in escrow, and are to be transferred to plaintiffs whenever the permit is free from threat of revocation.

The instant dispute arose because several provisions of the Texas Alcoholic Beverage Code ("Code") require a sustained period of Texas citizenship and/or residency before the Commission can issue a mixed beverage permit. The Commission refused to conduct background investigations on

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1 At oral argument, it was adduced the BCE no longer exists.

Wilson and Cooper because they, as non-Texas residents, were deemed per se ineligible under Texas law to hold a liquor permit.

The challenged Code provisions at that time provided:

* Section 11.46(a)(11) allows the TABC to refuse a permit to any applicant who has not been a Texas citizen for the three years immediately preceding his permit application.[2]

* Section 11.61(b)(19) allows the TABC to cancel a permit upon finding that the permittee was not a Texas citizen for the three years immediately preceding his permit application.[3]

* Section 28.04, relating to changes in corporate control, forbids renewal of a mixed beverage permit if there has been a change of ownership of over 50% of the corporate stock, unless the transferee is "qualified" to hold the permit.

* Section 109.53, located in the Code's regulatory and penal provisions, states unequivocally that "[n]o person who has not been a citizen of Texas for a period of three years immediately preceding the filing of his application therefor shall be eligible to receive a permit under this code."

Section 109.53 also includes what is commonly known as the "51 percent rule," which forbids the issuance of a permit to any corporation "unless at least 51 percent of the stock of the corporation is owned at all times by citizens who have resided within the state for a period of three years[.]" Any corporation

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2 "Applicant" is defined in § 11.45 to include the owners of a majority of the corporate stock.

3 "Permittee" is defined in § 11.61(a) to include the owners of a majority of a corporation's stock.

holding a permit in violation of this section risks the forfeiture of its corporate charter.

Under these Code provisions, consummation of the contemplated sale of KSE's remaining shares would have required the Commission to revoke KSE's permit. Accordingly, Wilson and Cooper filed suit in federal district court seeking declaratory and injunctive relief against these provisions, which, they contend, violate the Privileges and Immunities Clause found in Art. 4, § 2 of the U.S. Constitution and/or the Commerce Clause by prohibiting any person from owning a majority ownership in a permit-holding corporation unless that person has satisfied Texas' three-year durational residency and citizenship requirement.[4] After first finding that Wilson and Cooper possessed standing to assert their claims and that their action was ripe for adjudication, the district court declared the four Code provisions unconstitutional under both doctrines and enjoined their enforcement. All Defendants, W. S. McBeath as Administrator of the TABC and various private, Texas-based liquor interests acting as Intervenors-Defendants, timely appealed.[5]

Recent Developments

On June 19, 1993, 73 days after oral argument in this case, the Governor of Texas signed H.B. 1445 into law. H.B. 1445, whose relevant provisions became effective September 1, amended the Texas Alcoholic Beverage Code in several respects. Most important for our purposes, the revisions requirement with a one-year residency requirement with a one-year version. Plaintiffs (the out-of-state individuals desiring the permit) filed a

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[4] Three advocacy organizations, the Texas Package Store Association, Wholesale Beer Distributors of Texas, Inc., and Licensed Beverage Distributors Associations, Inc., were granted permission to intervene as defendants.

[5] For the sake of simplicity and because each Defendant is assumed to adopt the others' arguments, the various Defendants are referred to jointly as "Defendants" unless otherwise indicated.

suggestion of mootness urging that the Code amendments have rendered the case moot. The various Defendants argued otherwise, and we carried the motion with the case.

Preliminary Motions

1. *Mootness*

[1] The case is not moot. Our holding on this question is controlled by the Supreme Court's recent decision in *Associated General Contractors of America v. City of Jacksonville*, __U.S.__, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). In that case, the city of Jacksonville, Florida had enacted an ordinance establishing minority set-asides for city contracts. Twenty-two days after the Supreme Court granted certiorari, the city repealed the ordinance which, although different from the original, still set aside certain contracts for certified black- and female-owned business. Claiming that there was no longer a live controversy with respect to the constitutionality of the repealed ordinance, the city argued that the case should be dismissed as moot. In analysis squarely applicable to the instant case, the Supreme Court disagreed:

> [T]he mootness question is controlled by *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), where we applied the "well settled" rule that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.*, at 289, 102 S.Ct. at 1074. Although the challenged statutory language at issue in *City of Mesquite* had been eliminated while the case was pending in the Court of Appeals, we held that the case was not moot, because the defendant's "replead of the objectionable language was not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Ibid.*

> This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by replacing it with one that differs only in some insignificant respect. The gravamen of petitioner's claim is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors ... it disadvantages them in the same fundamental way. [footnote omitted]

__U.S. at __, 113 S.Ct. at 2301. *See also, Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1048 (5th Cir. 1993), *pet. for cert.* filed May 17, 1993 (in a challenge to a federal agency's proposed decision to demolish a public housing project, the agency's subsequent decision to reject the demolition application in no way mooted the Plaintiffs' request for injunctive relief.)

Although "[a] case might become moot if subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968), that cannot be said of the instant case. Texas' decision to supplant the three-year requirements with a one-year version does not prevent the state from later restoring the latter if this Court were to find it constitutional. Here, the new one-year residency/citizenship requirement may lessen the burden placed on the Plaintiffs, but insofar as they remain out-of-state with declared intentions of staying that way, the amendments' practical effect remains the same: Plaintiffs, as non-Texans, are treated differently.

Contrary to their assertion that H.B. 1445 has somehow operated to "repeal[] *any* residency requirement for non-Texans to own stock in Texas corporations with liquor permits," there persist some statutory impediments to their control, as nonresidents, of a permit-holding corporation.[6]

Neither of the traditional bases for mootness exists here. First, the issue presented--does the State's residency/citizenship requirement violate the Constitution?--is still quite live. *See Powell v. McCormich*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). Second, the parties still possess "a legally cognizable interest in the outcome." *Id.* Accordingly, although mootness is a close question here, Appellees' motion suggesting mootness is denied.

2. *Standing*

[2, 3] A second question is whether Cooper and Wilson lack adequate standing to maintain a suit. As defendants frame the argument, Cooper and Wilson are seeking to prevent injury to "the real party in interest in this case, namely KSE, the Texas

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6 Section 16 of H.B. 1445, 73rd Leg.R.S. amends the Alcoholic Beverage Code by adding § 6.03, a lengthy revision of the Code's citizenship requirements. § 6.03(g) declares that "there is no longer need for the three-year residency requirements with regard to those segments of the industry that sell alcoholic beverages to the ultimate consumer only." (Vernon Supp. 1993). It then states that the law retains a one-year requirement for those involved in certain other liquor-based enterprises. While the amended statute permits nonresidents to own the majority of stock in a corporate permit-holding retailer that is incorporated in Texas, it also requires *all* of the officers and a majority of the directors to have resided in the state for at least one year preceding the application for a liquor license. § 6.03(k) (Vernon Supp. 1993). Further, § 28.04(d) of the Code, as amended by H.B. 1445, permits the renewal of a liquor permit by a corporation in which legal or beneficial ownership of over 50% of the stock has changed since the original permit was issued *if* the applicant complies with § 11.46--which contains a one-year residency requirement. § 11.46(a)(11) (Vernon Supp. 1993). These more narrow residence requirements appear to apply to Cooper and Wilson, who filed affidavits stating that they have no intention of ever residing in Texas.

permit-holding corporation, rather than suing to redress any injury to themselves:

> Plaintiffs have brought their claims in their individual capacities and in essence challenge a provision of the Code which is a restriction on the right of a Texas corporation to hold a permit to sell alcoholic beverages in Texas. . . . Plaintiffs neither seek a permit as a sole proprietorship under the Code nor do they presently hold a permit. Under the facts in the record the district court erred in its determination that Plaintiffs have standing to assert their claim.

We disagree and affirm the district court's ruling, which held that the statues bar Plaintiffs' efforts as *individuals* to purchase and operate KSE. Defendants' protests of "subterfuge" aside, it is immaterial that the Plaintiffs are suing in their individual capacities and are not seeking to obtain a permit in their individual names. According to the Amended Complaint, the option to purchase the remainder of KSE's stock currently rests with Wilson and Cooper individually, and the record shows they are to receive the remainder 51 percent once the transfer can occur without endangering the permit. Plaintiffs allege a direct and personal injury--a limit on their ability as individuals to own a majority interest in a Texas, permit-holding corporation. The conditional nature of the sale further augments the determination of injury. KSE also has an interest in the dispute--who will its majority owners be?--but the Supreme Court has recognized that shareholders with an identifiably direct and person interest in a cause of action can bring suit "even if the corporation's rights are also implicated." *Franchise Tax Bd. of Ca. v. Alcan Aluminum*, 493 U.S. 331, 336, 110 S.Ct. 661, 665, 107 L.Ed.2d 696 (1990); *see also Nowling v. Aero Services Intern, Inc.*, 752 F.Supp. 1304, 1314 (E.D.La. 1990). Moreover, the 51 percent rule contemplates that direct focus is upon the shareholders. This would seem particularly important when the entity involved is, as here, a closely held corporation.

Having disposed of this introductory question, which touches upon the prudential wing of the standing doctrine, we now decide whether the Plaintiffs have satisfied the requisite elements for Article III standing. As the Supreme Court neatly summarized in the recent case, *Lujan v. Defenders of Wildlife*, __U.S.__, __, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992), plaintiffs must have suffered an "injury in fact," caused by the challenged government conduct, which is likely to be redressed by the relief they seek.

Wilson and Cooper easily satisfy these elements. First, because they are non-Texas citizens, they are personally prevented from acquiring the remaining stock of KSE because of the Commission's threatened revocation of KSE's liquor permit. They are asserting their own constitutional rights based on specific injury. Second, it is indisputable that threatened enforcement of the challenged Code provisions has caused their injury; the statue is an absolute bar to Plaintiffs' majority ownership of the holder-corporation. As McBeath concedes, "acquisition of any additional stock by either BCE or the individual plaintiffs would cause KSE to be disqualified. *The defendant would immediately initiate an administrative action to cancel KSE's permit.*"[7] (emphasis added). Finally, the injury would be redressed by a favorable ruling striking down the residency/citizenship requirement.

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[7] McBeath's promise of threatened enforcement is likewise sufficient to thwart any assertion that the dispute lacks ripeness. Substantial hardship--the touchstone for determining when review if appropriate--exists where the enforcement of a statute is assured and the only obstacle to ripeness is merely a delay before the action or proceedings commence. "Where the application of a law is inevitable and consequences attach to it, the Court will find the matter ripe before the actual proceedings occur." Erwin Chemerinsky FEDERAL JURISDICTION § 2.3, at 105 (1989). *See Abbot Laboratories v. Gardner*, 387 U.S. 136, 152, 87 S.Ct. 1507, 1517, 18 L.Ed.2d 681 (1967); *Caprock Plains Federal Bank v. Farm Credit Admin.*, 843 F.2d 840, 944-46 (5th Cir. 1988).

None of the prudential concerns favoring judicial self-restraint counsels against deciding the constitutional questions presented today. *See, e.g., Apache Bend Apts. v. U.S. Through, I.R.S.*, 987 F.2d 1174, 1176-77 (5th Cir. 1993) (en banc) (and cases cited and discussed therein, explicating the foundations for the judiciary's policy of avoiding the unnecessary resolution of constitutional issues). As this court recently emphasized *en banc* in *Apache Bend*, the federal judiciary's power to adjudicate constitutional disputes "is reserved for those instances in which it is necessary for the vindication of individual rights." *Id.* at 1176. The Plaintiffs have alleged a redressable injury sufficient to satisfy Article III and otherwise suitable for judicial review.

We turn to the principal issue: whether the challenged provisions offend the Constitution.

Texas v. The Commerce Clause

1. *The Clause Itself*

[4] The Commerce Clause states: "The Congress shall have power ... To regulate Commerce ... among the several States[.]" U.S. Const., Art. I, § 8, cl. 3. It is well settled, however, that while its literal terms speak only of powers bestowed upon Congress, the clause also contains a "dormant" facet that serves as "a substantive restriction on permissible state regulation of interstate commerce." *Dennis v. Higgins*, __U.S.__, __, 111 S.Ct. 865, 872, 112 L.Ed.2d 969 (1991) (internal quotation marks omitted). As the Supreme Court has emphasized, "This 'negative' aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988). The Court has also struck down state efforts to grant its own residents preferred rights of access over nonresidents to resources located within its borders. *See, e.g., Hughes v.*

Oklahoma, 441 U.S. 322, 337-38, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979).

[5, 6] In analyzing cases of alleged economic isolationism brought under the Commerce Clause, the Supreme Court has constructed a two-tiered approach. Under this framework, state statues that directly discriminate against interstate commerce, or whose effects favor in-state economic interests at the expense of out-of-staters, are routinely struck down, *see, e.g., Limbach*, 486 U.S. 269, 108 S.Ct. 1803; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) (statute prohibiting entry into an industry by nonresidents is facially invalid under Commerce Clause); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Limbach*, 486 U.S. at 274, 108 S.Ct. at 1808; *see also, e.g., Maine v. Taylor*, 477 U.S. 131, 138-39, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986).

When, however, a statute regulates in an evenhanded manner and had only direct effects on interstate commerce, we assess "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers v. N.Y. State*, 476 U.S. 573, 579, 106 S.Ct. 2080, 2084, 90 L.Ed.2d 552 (1986) (citing the flexible balancing approach first articulated by *Pike v. Bruce Church, Inc.*, 397 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)). While no clear rule exists to tell us when to apply the stricter rule of invalidity, *see, e.g., Brown-Forman*, 476 U.S. at 579, 106 S.Ct. at 2084, a finding of economic protectionism can be based solely upon a statute's discriminatory effect. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270, 104 S.Ct. 3049, 3054-55, 82 L.Ed.2d 200 (1984).

[7] Because the 51 percent ownership requirement, the crux of the dispute, was enacted immediately following the repeal of the Eighteenth Amendment it cannot fairly be viewed as protectionist in its original intent, since no local liquor industry then existed in Texas. But that is only half the inquiry. As announced above, protectionism (while absent in motivation) can manifest itself in effect. Such overt, in-state favoritism as the TABC provisions embody cannot be ignored as incidental.

From a practical standpoint, there can be little doubt that the State is not entitled to the lesser standard of scrutiny of *Bruce Church*. Since 1935, when post-Prohibition Texas enacted its comprehensive regulatory scheme concerning the distribution and sale of alcoholic beverages, every permit issued has been granted only to Texans. As the Plaintiffs note, under Texas law, "no foreigners need apply." Although someone from out-of-state is permitted to own a minority interest in a Texas, permit-holding corporation, the Code's plain terms forbid non-Texans from acquiring majority ownership. This impenetrable barrier to entering the Texas liquor industry on substantially equal terms as Texans enjoy discriminates against out-of-staters.

But while the State is not entitled to the more flexible approach, even plainly discriminatory statues may survive a Commerce Clause challenge if the State can demonstrate that the statutes advance "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Limbach*, 486 U.S. at 278, 108 S.Ct. at 1810. The burden rests with Texas to rescue its statutes.[8] The standards for such a task, however, are towering. *Cf.*, *Hughes*, 441 U.S. at 337, 99 S.Ct. at 1737 ("[F]acial discrimination by itself may be a fatal defect" and "[a]t a minimum ... invokes the strictest scrutiny"); *City of Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535 ("[W]here

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[8] Since the burden rests with the State to justify its statutes, we reject Defendants' argument that the district court erred in not requiring the Plaintiffs to prove discriminatory intent.

simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected").

[8] Defendants' purported justifications are unpersuasive and insufficient to defend the State's arbitrary treatment of non-Texans. The State contends first that is distribution system was established "to protect the health, safety, welfare, morals and temperance" of its citizens. Tex.Alco.Bev.Code Ann. § 1.03 (West 1978)(articulating these as the policy goals underlying the Texas Liquor Control Act). Such boilerplate enabling language hardly explains the State's particular restrictions on out-of-state ownership of various liquor licenses.

As their practical justification for the Code's in-state residency requirement, Defendants assert that the Commission's approval of alcoholic beverage permits is based on an intensely local screening of each applicant's reputation in the community plus a complete, thorough business and financial investigation performed by TABC. Further, the Commission's ability to investigate an out-of-state applicant's reputation and qualifications is severely limited. But however legitimate may be the State's ultimate goals, it cannot pursue them via the illegitimate means of a flat proscription of non-Texans. *See City of Philadelphia*, 437 U.S. at 626-27, 98 S.Ct. at 2537 ("whatever [a State's] ultimate purpose, it may not be accomplished by discriminating ... [against out-of-state citizens] unless there is some reason, apart from ... origin, to treat them differently").

In addition to demonstrating the statutes' local benefits, the State must prove the unavailability of neutral alternatives adequate to protect the interests at stake. *E.g., Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736 (internal citation omitted). In this age of split-second communications by means of computer networks, fax machines, and other technological marvels, there is no shortage of less burdensome, yet still suitable, options. At first blush, interstate investigations would seem hardly more

difficult than intrastate ones. If Texas desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling applications with the "burden" of residing in Texas.[9] Nonresident liquor license applicants may be required to furnish whatever information the State deems necessary, together with a release to permit rigorous verification checks. The state's penalties for duplicity should apply equally to resident or nonresident permit-holders, as may its provisions requiring the furnishing of bonds by permit holders. Out-of-state applicant may be required to file a consent to suit in Texas courts. Texas law already denies applications to corporations not organized under the laws of Texas, Tex.Alco.Bev.Code Ann. § 109.53 (West Supp. 1993), and a holder-corporation that violates the state's laws faces revocation of its permits, dissolution of its corporate charter, and other civil and criminal penalties. The entity's employees or supervisors can, of course, be criminally prosecuted regardless where they reside.

While the State has ineffectively attempted to justify its statutes "in terms of the local benefits flowing from [them]," it has also failed to demonstrate "the unavailability of nondiscriminating alternatives adequate to preserve the local interests at stake." *Wyoming v. Oklahoma*, __U.S.__, __, 112 S.Ct. 789, 801, 117 L.Ed.2d 1 (1992). So long as an applicant meets the necessary qualifications and comports himself according to the governing standards, the State would be hardpressed to offer a justification substantial enough to authorize a wall prohibiting equal competition of non-Texans in the retail liquor business.

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[9] Defendants have not requested a remand nor suggested that, if given the opportunity, they could prove that the barrier erected against non-Texans furthers legitimate concerns that cannot adequately be advanced by neutral alternatives. Because we are convinced that Texas enjoys numerous options capable of serving its interests short of a flat ban, remand would be a poor use of the judiciary's finite resources. *Cf. Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, __ U.S.__, __, n. 8, 112 S.Ct. 2019, 2027 n. 8, 119 L.Ed.2d 139 (1992).

2. *The Twenty-first Amendment*

The Defendants posit an alternative argument: even if the statutes violate traditional Commerce Clause principles, the Twenty-first Amendment imbues the States with carte blanche authority to manage the flow of alcohol within their borders. Section 2 of that Amendment provides: "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const.Amend. XXI, § 2.

The assertion that § 2 of the Twenty-first Amendment automatically trumps the rigors of the Commerce Clause cannot stand:

> To draw a conclusion ... that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331-332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964). Older caselaw embraced the broad proposition that the Amendment had granted the States almost unfettered authority to regulate commerce in intoxicating liquors unconstrained by negative Commerce Clause restrictions. *See, for example, State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-63, 57 S.Ct. 77, 78-79, 81 L.Ed. 38 (1936) and its progeny. This is no longer the end of the matter. While subsequent Supreme Court opinions have at times alluded back to the *Young's Market* view that the Amendment confers "virtually complete control over ... how to structure the liquor distribution system," *Cal. Retail*

Liquor Dealers Ass'n v. Midcal Alum, 445 U.S. 97, 110, 100 S.Ct. 937, 946, 63 L.Ed.2d 233 (1980), this unique power is not absolute and must coexist with Congress' power to regulate commerce. In *Bacchus*, which shared the instate case's focus on states' authority to regulate liquor unconstrained by the negative Commerce Clause, the Supreme Court put it succinctly: "It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Bacchus*, 468 U.S. at 275, 104 S.Ct. at 3057.

[9, 10] The Twenty-first Amendment does not necessarily immunize state laws from invalidation under the Commerce Clause, and the chief question is whether the interests implicated by a State's regulation "are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714, 104 S.Ct. 2694, 2708, 91 L.Ed.2d 580 (1984). "[T]he central purpose of the Amendment was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in presenting economic Balkanization." *Bacchus*, 468 U.S. at 276, 104 S.Ct. at 3058 (citations omitted). While courts have recognized generally the need "to combat the perceived evils of an unrestricted traffic in alcoholic beverages" as a permissible, if vague, purpose of the Twenty-first Amendment, *see id.*, "laws that constitute mere economic protectionism are ... not entitled to the same deference." *Id.* The core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination animating the Commerce Clause. *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 344, 109 S.Ct. 2491, 2503, 105 L.Ed.2d 275 (1989) (Justice Scalia, concurring).

[11] The statutory barrier Texas has erected against non-residents who wish to obtain mixed beverage permits results

in shielding the State's operators from the rigors of outside competition. This rule subjects such laws to the Commerce Clause's insistence on nondiscrimination. And contrary to Defendants' assertions, the state's interest in facilitating background checks of permit applicants by discriminating against nonresidents is not within the "core concerns" of the Twenty-first Amendment. *Compare North Dakota v. U.S.*, 495 U.S. 423, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) (state's liquor labeling and reporting requirements are within ore of state powers under Twenty-first Amendment). The discriminatory three-year residency requirement inherent in the challenged statutory provisions cannot stand.[10]

CONCLUSION

For the foregoing reasons, the motion to dismiss as moot is denied, and the district court's judgment for the Plaintiffs is AFFIRMED.

Motion DENIED; Judgment AFFIRMED.

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[10] Since we dispose of this case on Commerce Clause grounds, we need not address Plaintiffs' alternative argument, that the challenged statutes breach the Privileges and Immunities Clause of Art. IV, § 2.

APPENDIX B

CIVIL ACTION NO. A-90-CA-736
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD L. WILSON and STEVE COOPER VS.
W. S. McBEATH

ORDER

The Plaintiff sued W. S. McBeath, Administrator of the Texas Alcoholic Beverage Commission, under 42 U.S.C. § 1983 to enjoin enforcement of the provisions of the Texas Alcoholic Beverage Code that establish a three-year durational residency requirement for obtaining a mixed beverage permit in Texas. Plaintiffs challenge the provisions of the Texas Alcoholic Beverage code under both the Privileges and Immunities Clause and the Commerce Clause. As set out below, the Court finds that the provision violate the Commerce Clause and the Privileges and Immunities Clause and grants permanent injunction prohibiting their enforcement.

I. FACTUAL AND LEGAL BACKGROUND

Plaintiffs Cooper and Wilson are residents of Tennessee and Florida, respectively. Together, they own a majority interest in Bexar County Enterprises, Inc., a Tennessee corporation [BCE], which agreed to purchase 49% of the stock of K.S. Enterprises, Inc. d/b/a "Baby Dolls" [KSE], a Texas corporation holding a mixed beverage permit in the State of Texas. Plaintiffs Wilson and Cooper, as individuals, own an option to purchase the remaining 51% of the stock of KSE.

The Texas Alcoholic Beverage Code [the Code] requires three years of residence in the State of Texas prior to the grant of a mixed beverage permit by the Texas Alcoholic Beverage

Commission [the Commission].[1] This requirement applies directly to individuals seeking to hold a mixed beverage permit, and indirectly to individuals who own a majority of the stock of a corporation holding a mixed beverage permit. The Code provides for the revocation of a permit, or the refusal to renew, for failure to satisfy the three-year residency requirement. Under the provisions of the Code, the consummation of the contemplated sale of KSE's stock would requirement the Commission to cancel KSE's mixed beverage permit.

The Plaintiffs filed suit in this Court seeking preliminary and permanent injunctions against the enforcement of the durational residency requirements of the Code, as well as a declaratory judgment that the provisions violate the Privileges and Immunities Clause and the Commerce Clause of the Constitution. After a hearing, the Court denied the Plaintiffs' application for a preliminary injunction. Following the intervention of Wholesale Beer Distributors of Texas, Inc. and

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[1] The Sections embodying this restriction are TEX. ALCO. BEV. CODE ANN. §§ 11.46, 1161. 28.04, 109.53 (Vernon 1978). Section 11.46(11) allows the Commission to refuse to grant a permit to an applicant who has not been a Texas citizen for the three years preceding his application for a permit. "Applicant" is defined in Section 11.45 to include the owners of a majority of the corporate stock. Section 11.61(b)(19) allows the Commission to cancel a permit upon finding that the permittee was not a Texas citizen for the three years preceding his application for a permit. "Permittee" is defined in Section 11.61(a) to include the owners of a majority of a corporation's stock. Section 28.04 relates to changes in corporate control, allowing the Commission to refuse renewal of a mixed beverage permit if there has been a change of ownership of over 50% of the stock of a corporation holding a mixed beverage permit. Finally, in the regulatory and penal provisions of the Code, Section 109.53 states unequivocally that "[n]o person who has not been a citizen of Texas for a period of three years immediately preceding the filing of his application therefore shall be eligible to receive a permit under this code." Section 109.53 further provides that permits may be issued only to Texas corporations that have 51 % of their stock owned by citizens who have resided in Texas for three years, and provides for forfeiture of the corporate charter of any corporation holding a permit in violation of this requirement. TEX. ALCO. BEV. CODE ANN. § 109.53 (Vernon 1978).

Licensed Beverage Distributors Association, Inc., and Texas Package Stores Association, Inc. as Defendant-Intervenors, both the Plaintiffs and the Defendant moved for summary judgment, and the Defendant moved for judgment on the pleadings. Intervenor Licensed Beverage Distributors Association, Inc. joined in the Defendant's Motion for Summary Judgment and filed a brief in support. The Court denied the Defendant's Motion for Judgment on the Pleadings by an Order dated March 20, 1991, finding that the Plaintiffs have standing to assert their claims and that the claims are ripe for adjudication. In April, 1991, the Defendant and Intervenors filed additional briefs supporting their Motion for Summary Judgment and responding to the Plaintiff's Motion for Summary Judgment. The Court now rules on the parties' cross-motions for summary judgment.

II. THE COMMERCE CLAUSE CHALLENGE

> If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

United States v. Women's Sportswear Mgf. Ass'n, et al., 396 U.S. 460, 464 (1949).

The Plaintiffs assert that the purpose of the durational residency requirement of the Texas Alcoholic Beverage Code is to protect local liquor retailers from competition by non-residents, and that such protectionism violates the Commerce Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3. The Defendant admits that the challenged provisions favor Texas residents over non-residents, see Defendant's Original Answer para. XXV, but asserts that the state's regulation of intoxicating liquors is immune from this Commerce Clause challenged by virtue of the Twenty-first Amendment, which grants states broad authority to regulate the distribution and sale of intoxicating liquors. See U.S. CONST. amend. XXI; Defendants' Opposition to Plaintiffs' Application for Preliminary Injunction and Motion for Summary Judgment at 16. By this Order, the Court finds

that the residency requirement violates the Commerce Clause and further finds that deference to state regulatory authority under the Twenty-first Amendment does not alter the Constitutional defects of the Code.

A. Commerce Clause Analysis

The Commerce Clause is an explicit grant of authority to the federal government "[t]o regulate Commerce . . . among the several states." This provision, however, has also been interpreted as an implicit limitation on states' authority to erect barriers against interstate trade. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). Under the latter application of the Commerce Clause, states are prohibited from placing themselves in positions of economic isolation by enacting protectionist statutes. *Id.* at 36. To effectuate this limitation on the states, the Supreme Court developed a two-tiered approach for analyzing state statutes under a Commerce Clause challenge. Under this approach, a *per se* rule of invalidity is applied to state laws that operate as "outright protectionism;" a lesser standard is applied to state laws that effect "more indirect burdens on the free flow of trade." *Id.* Statutes that burden interstate commerce only indirectly--statutes that do not favor instate economic interests over out-of-state interests--will withstand a Commerce Clause challenge if they are narrowly tailored to effectuate a legitimate state interest. *See id.* at 36-37; *Brown-Forman Distillers Corp. v. new York Liquor Authority*, 476 U.S. 573, 578-59 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 170 (1984).

There is no clear line to distinguish statutes that directly burden interstate commerce from those that are an indirect burden. In each case the Court must consider the statute's overall effect on local and interstate activity. *Brown-Forman Distillers Corp.*, 476 U.S. at 579. "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Investment Managers, Inc.*, 447

U.S. at 37. If a statute absolutely prohibits entry into an industry by non-residents, then the challenged statute clearly discriminates against out-of-state economic interests. Such a prohibition is the most extreme form of economic protectionism. *See Lewis*, 447 U.S. at 42. It is unnecessary to prove in such a case that the *purpose* of the statute is protectionist, given that the undisputed effect of the statute is to favor in-state economic interests over out-of-state interests. *See Bacchus* at 270-71 ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect . . . .").

The Court's finding in the present case is supported by the Supreme Court's holding with regard to a similar statute in *Lewis v. BT Investment Managers, Inc.* The statute at issue in *Lewis* prohibited the entry of out-of-state bank holding companies in the local investment advising industry. The Court found that the statute, and the arguments made in support of its validity, were "at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Id.* at 44.

Because the three-year durational residency requirement for obtaining a mixed beverage permit under the Texas Alcoholic Beverage Code has the effect of economic protectionism, the Court finds that the provisions are a *per se* violation of the Commerce Clause. The Court will not examine the effect of the Twenty-first Amendment on this finding.

B The Twenty-First Amendment

The Defendant and the Intervenors argue that the Twenty-first Amendment, which grants broad authority to the States to regulate in the area of alcoholic beverages, saves the state from invalidation under the Commerce Clause. This argument was explicitly rejected by the Supreme Court in several recent decisions invalidating discriminatory state liquor

regulations. Likewise, in the present case, the Court finds the Defendant's invocation of the Twenty-first Amendment inadequate to rebut the Plaintiffs' Commerce Clause challenge.

The Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the Untied States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI § 2. Under the Amendment, states may regulate the importation and distribution of liquor. Until recently, however, the implications of the Amendment for regulations that conflict with other Constitutional provisions were unsettled.

Early cases indicated that the Twenty-first Amendment created an exception to normal operation of the Commerce Clause. *See Craig v. Boren*, 429 U.S. 190, 206 (1976) (citing *Carter v. Virginia*, 321 U.S. 131, 139-40 (1944); *Finch v. Co. v. McKittrick*, 305 U.S. 395, 398 (1939)). In 1984, the Supreme Court explicitly rejected that view in *Bacchus Imports v. Dias*, and adopted a balancing approach:

> It is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause. For example, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964), the Court states: "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification." We also there observed that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in

> any case is thus *whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the [challenged state statute] to outweigh the Commerce Clause principles that would otherwise be offended.* Or as we recently asked in a slightly different way, "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

468 U.S. 263, 275 (1984) (emphasis added). In *Bacchus* and in several other recent cases, the Supreme Court applied this balancing test to statutes that effect economic protectionism, and found in each case that the Twenty-first Amendment failed to save the challenged statute from invalidation under the Commerce Clause. *See id.* at 276; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715-16 (1984); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 484 (1984).

Although, as the Supreme Court recognized in *Bacchus*, 468 U.S. at 274-75, the intended scope of state authority was unclear at the time of the Amendment's ratification, the Court has attempted to define the core powers granted to states by the Amendment. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, the Supreme Court stated that the state's authority extends over whether to permit the importation or sale of liquor in the state, and if so, how to structure the liquor distribution system. 445 U.S. 97, 110 (1980). More specifically, the Court in *Midcal Aluminum* stated that the central power under the Twenty-first Amendment is "regulation the times, places, and manner under which liquor may be imported and sold." *Id.* at 716. The Court in *Midcal Aluminum*, and later in *Capital Cities Cable, Inc. v. Crisp*, also recognized

the state's legitimate goal of promoting temperance. *Midcal Aluminum*, 445 U.S. at 113-14; *Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984).

The Texas statute challenged here does not fall directly within the state's grant of authority to regulate the importation or distribution of liquor. The challenged provisions limit the pool of mixed beverage licensees to three-year residents of the State of Texas; the provisions do not regulate the time, place, or manner of sale or any other aspect of the distribution of liquor in the state. Furthermore, none of the justifications for the statute offered by the Defendant (discussed infra in Part III(B)) establish a nexus between the exclusion of nonresdient applicants and the State's purported objective of promoting temperance, which the Supreme Court has recognized as a legitimate state interest.

In defining the contours of the Twenty-first Amendment, the Supreme Court has expressly excluded state liquor regulations that promote economic protectionism from the ambit of the Twenty-first Amendment:

> Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization.

Bacchus, 468 U.S. at 276; *see also Healy v. Beer Institute, Inc.*, 491 U.S. 324, 344 (1989) (Scallia, J., concurring) ("[The challenged statute's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment.")

The Court finds that the durational residency requirement of the Texas Alcoholic Beverage Code does not fall within the core powers of the state under the Twenty-first Amendment; and

furthermore, that the statute's protectionist effect negates any claim under the Twenty-first Amendment which would protect the statute from invalidation under the Commerce Clause. For these reasons, the Court declares the provisions invalid as violative of the Commerce Clause, and grants a permanent injunction against their enforcement.

III. THE PRIVILEGES AND IMMUNITIES CLAUSE

Plaintiffs also challenge the validity of the residency requirement under the Privileges and Immunities Clause. U.S. CONST. art. IV, § 2. The Privileges and Immunities Clause and the Commerce Clause share a common origin in the fourth article of the Articles of Confederation, which provided for the creation and protection of national economic union. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 (1985). These two clauses have a "mutually reinforcing relationship," *see Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978). Although the Privileges and Immunities Clause analysis differs somewhat from Commerce Clause analysis, the Privileges and Immunities Clause provides an alternative basis for Plaintiffs' challenge to the Texas residency requirement.

The first determination under Privileges and Immunities analysis is whether the activity or right infringed upon falls within the scope of rights protected by the Privileges and Immunities clause. If the activity is protected, the discrimination violates the Clause unless there is a substantial reason for the discrimination, and the discrimination is substantially related to the state's objective.

A. Scope of Protection Under the Privileges and Immunities Clause

A long line of Supreme Court cases support Plaintiffs' assertion that a statute which prohibits the practice of any trade or business based on residence violates the Privileges and Immunities Clause. *See, e.g., Supreme Court of New*

Hampshire v. Piper, supra (practice of law), *Hicklin v. Orbeck, supra* (jobs related to state-owned oil and gas fields), *Toomer v. Witsell,* 334 U.S. 385 (1948) (shrimp fishermen), *Ward v. Maryland,* 12 Wall. 418 (1871) (merchants). The Defendant contends that *Piper* and the cases upon which it rests require the Court to inquire whether the occupation in question is a fundamental privilege protected by the Privileges and Immunities Clause. The Defendant argues that selling mixed beverages is not such an occupation. The Defendant's interpretation of the case law is not wholly unsupportable. However, the Court finds the Defendant's proferred analysis inadequate when considering the implications of doctrine set out in the precedent cited above.

The early Privileges and Immunities cases established that nonresidents are protected from discrimination when they seek to engage in commercial activities. In *Toomer v. Witsell, supra,* the Supreme Court struck down under the Privileges and Immunities Clause a statute that imposed a license fee on nonresident shrimp fishermen that was 100 times the amount of the fee for residents. The Court stated that "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer* at 396. Citing *Toomer*, the Court struck down a similar licensing scheme for commercial fisherman in *Mullaney v. Anderson,* 342 U.S. 415 (1952).

In *Austin v. New Hampshire,* 420 U.S. 656 (1975), the Court expounded on the Privileges and Immunities Clause, stating that it "establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." *Id.* at 660. Attempting to delineate the scope of rights protected by the Privileges and Immunities Clause, the Court examined the concerns of the Framers, as expressed in the fourth article of the Articles of Confederation, which was the source of the Privileges and Immunities Clause: "[T]he people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the *privileges or trade and*

commerce, subject to the same duties, impositions and restrictions as to the inhabitants thereof respectively." *Id.*

The more recent Supreme Court decisions draw on the earlier cases to support the commercial nature of the scope of rights protected by the Privileges and Immunities Clause. In 1978, the Supreme Court decided two cases applying the Privileges and Immunities Clause, which continue to present the paradigm for analyzing statutes under the Clause. In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the Court struck down a statute which mandated a hiring preference for residences in jobs on state-owned oil and gas fields in Alaska. The *Hicklin* Court summarized the prior case law as establishing that "discrimination against nonresidents seeking to *ply their trade, practice their occupation or pursue a common calling* within the State" violates the Privileges and Immunities Clause. *Hicklin* at 524. That same year, in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978), the Court upheld a Montona statute imposing license fees for nonresidents to hunt elk which were substantially higher than the fees for residents. The Court in *Baldwin* also interpreted the previous case law as prohibiting states from imposing unreasonable burdens on nonresidents "in their pursuit of common callings," *id.* at 383, but found that elk hunting by nonresidents was a recreation, not a means of livelihood, and thus was not protected by the Privileges and Immunities Clause. *Id.* at 388. The Court created a dichotomy in *Baldwin* by denying protection for a "recreation" while recognizing that the "pursuit of common callings" and other activities, such as the ability to transfer property and access to courts, are protected by the Privileges and Immunities Clause because they are "basic and essential," and interference with these activities would "frustrate the purposes of the formation of the Union." *Id.* at 387. Elk hunting was found not to be such a "fundamental" right or activity.

The *Baldwin* Court, however, did not attempt to define the limits of the class of fundamental activities protected by the Privileges and Immunities Clause:

> We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

Id. at 388. Writing separately, Chief Justice Burger attempted to explain the limits of the effect of the majority's holding on the class of protected activities: "[The majority] acknowledges that the Clause requires equality with respect to privileges 'bearing upon the vitality of the Nation as a single entity.' It seems clear that those basic privileges include 'all the privileges of trade and commerce' which were protected in the fourth Article of the Articles of Confederation." *Id.* at 394 (Burger, C.J., concurring). The *Baldwin* and *Hicklin* decisions indicate that the distinction between protected and unprotected activities turns on whether the activity is "commerce" rather than "recreational."

In 1985, the Supreme Court in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), struck down a residency requirement for admission to the state bar of New Hampshire. After discussing the prior case law, the Court found that "[l]ike the occupations considered in our earlier cases, the practice of law is important to the national economy." *Id.* at 281. Therefore, the practice of law was deemed a "fundamental right" falling within the ambit of the Privileges and Immunities Clause. *Id.* The Court buttressed its finding by recognizing the noncommercial role of lawyers, particularly out-of-state lawyers, in championing unpopular causes and vindicating important federal rights. *Id.* at 281.

The Court in *Piper*, however, rejected the argument that because the practice of law is "bound up with the exercise of judicial power and the administration of justice," the state can prohibit nonresidents from the bar based on the "government power" rationale. The government power rationale for discriminating against nonresidents allows states to prohibit nonresidents from voting or holding political office. *Id.* at 282-83 & n.13; *see also Laycock, Equality and the Citizens of Sister States*, 15 Fla. St. U.L. Rev. 431, 433-436 (1987). In fact, this rationale provides the basis for Justice Rehnquist's dissent; he took the view that lawyers are similar to elected officials, and since states are permitted to require residence for elected officials, they may also require residence for admission to the bar. *Piper* at 291 (Rehnquist, J., dissenting). Even though the majority recognized the special noncommercial role of lawyers, its holding was based on the trade or business aspect of the practice of law. *See id.* at 283 (The lawyer "makes his own decisions, follows his own best judgment, collects his own fees and *runs his own business*.")

The case law supports the Plaintiff's argument that the Privileges and Immunities Clause protects commercial activities. Scholarly literature reinforces this interpretation of the Privileges and Immunities Clause, particularly the literature devoted to determining the original intent of the Clause. *See* Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987); *Simson, Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 383-389 (1979); Gergen, *The Selfish State and the Market*, 66 TEXAS L. REV. 1097, 1118-28 (1988). As earlier discussed, both the Privileges and Immunities Clause and the Commerce Clause were derived from the Fourth Article of the Article of Confederation, which provided that:

> [T]he free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the respective states; and the

> people of each state shall have free ingress and egress to and from any other State, and *shall enjoy therein all the privileges of trade and commerce*, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Bogen, *supra* at 823 (emphasis added). When this provision was incorporated into the Constitution, the trade and commerce clause was omitted because, as Madison argued, the privileges and immunities of free citizens includes the privileges of trade. *See* FEDERALIST No. 42.

The Commerce Clause was also derived from Article Four of the Articles of Confederation. One commentator suggests that the explicit grant of authority to the federal government to regulate commerce made unnecessary the prohibition on state laws against regulating commerce in a discriminatory manner. Bogen, *supra* at 836. There is, however, a general consensus that the Constitutional's Privileges and Immunities Clause was intended to protect commercial activities. See, e.g., Bogen, supra at 836. *See, e.g.*, Bogen, *supra* at 856 (stating that the right to engage in a trade or business is a "privilege or immunity of citizenship."); Gergen, *supra* at 1129 (asserting that all of the early cases striking down state laws under the Privileges and Immunities Clause involved the "core privileges of trade and commerce"). The scholarly debate centers on whether the Privileges and Immunities Clause protects more than the privileges of trade and commerce. Although several scholars argue that the Clause should protect a more broad scope of rights, most agree that the original intent and subsequent interpretation of the Clause do not support such a view. *See, e.g.*, Gergen, *supra* at 1128 ("The background of the privileges and immunities clause, its relation to other provisions, and its interpretation in the early years of the republic all suggest that the Framers sought by the privileges and immunities clause only to ensure outsiders the right to engage in

trade and commerce free from discriminatory tax or regulatory burdens.").

Based on this understanding of the Privileges and Immunities Clause, the Court rejects the Defendant's argument that only certain trades or occupations are protected by the Privileges and Immunities Clause. The Defendant's interpretation of the scope of protected rights under the Privileges and Immunities Clause distorts the holdings in *Hicklin* and *Baldwin* and fails to follow the reasoning in *Piper*. Owning and operating nightclubs is commercial activity, not recreation. Regardless of how that particular occupation is perceived, whether it is viewed with disdain or esteem, it is still an occupation, and the Privileges and Immunities Clause prohibits discrimination against nonresidents in access to the practice of that occupation. Moreover, the Defendant's interpretation of the Privileges and Immunities Clause would require the Supreme Court to engage in an occupation-by-occupation analysis to determine which occupations are protected by the Privileges and Immunities Clause. This Court rejects the argument that the Supreme Court intended *Piper* to require such an analysis.

Much of the Intervenors' briefing is devoted to arguing that there is no fundamental right to sell alcoholic beverages. The Intervenors cite authority for this proposition at length. Their argument is, however, addressed to the wrong question. The Plaintiffs do not claim a substantive right to sell alcoholic beverages. They claim the right to apply for a license to conduct their business of selling mixed beverages, and to have that application considered on equal terms with residents of the State of Texas.

The Court finds that the Texas prohibition against nonresident ownership of mixed beverage licenses falls within the scope of the Privileges and Immunities Clause. The Court will now examine the justifications for the discrimination against nonresidents offered by the State of Texas.

B. Scrutiny of State Justifications for Discriminatory Treatment of Nonresidents.

To withstand a Privileges and Immunities challenge, discrimination based on residence must have a substantial reason, and the discrimination must bear a substantial relationship to the state's objective. *Piper*, 470 U.S. at 284. The Defendant must show "something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." *Hicklin*, 437 U.S. at 526 (quoting *Toomer*, 334 U.S. at 398). The Defendant offers several justifications for the discriminatory treatment of nonresident applicants for mixed beverage permits, none of which satisfy the standard of scrutiny required by the Privileges and Immunity Clause.

Several of the proffered justifications relate to the investigation of applicants conducted by the Texas Alcoholic Beverage Commission. The Affidavit of Joe Darnall, General Counsel for the Texas Alcoholic Beverage Commission, states that the residency requirement improves the ability of the Commission to ascertain whether an applicant will sell alcoholic beverages in violation of the Code, and whether an applicant conforms with restrictions that prohibit a licensee from owning an interest in a package store or in a manufacturer or wholesaler of alcoholic beverages, and from living with a person whose mixed beverage license has recently been revoked. Mr. Darnall also asserts that the Commission has no official status or subpoena power to investigate nonresidents or inspect their financial records.

First, the Court notes that there is no evidence that nonresidents are more likely than residents to violate provisions of the Code or to lack conformity with other restrictions on licensees. An increase in the administrative burden of investigating these matters for nonresidents applicants is not a substantial reason for prohibiting nonresident licensees. *See Silver v. Garcia*, 760 F.2d 38-39 (1st Cir. 1985).

Second, the Commission's argument that is lacks the "official status" necessary to conduct investigations of nonresidents is unpersuasive. The Commission does not have "official status" to investigate residents unless those residents submit to such an investigation by applying for a license. Nonresident applicants must, of course, also submit to an investigation as a prerequisite for obtaining a permit. The Commission may, in addition, require all applicants to submit their financial records for inspection. The Commission's investigatory powers stem from its authority to grant or deny licenses, not from any territorial authority operating only within the State of Texas. Since an applicant's willingness to submit to an investigation has not been shown to depend on residence, this justification for prohibiting nonresident licensees also fails.

The Defendant also offers justifications for the discriminatory treatment of nonresidents based on the State's limited ability to enforce the provisions of the Code against nonresident licensees. Mr. Darnall's Affidavit asserts that the residency requirement allows the State to arrest the licensee if he violates the criminal provisions of the Code, and subjects the licensee to process in state court for civil suits arising from the operation of his license. Mr. Darnall also states that every nonresident licensee will be able to remove a state court proceeding to federal court based on diversity of citizenship. Finally, Mr. Darnall asserts that it is easier to collect a judgment against a resident than a nonresident.

Although the proferred justifications may support a pure residency requirement, they do not substantiate the necessity of a three-year durational residence. The Court points out that Section 11.61 of the Code allows the Commission to require licensees to maintain a bond, and Section 11.70 provides for the institution of a suit against the bond for violations of the Code. These provisions contemplate the State's potential inability to apprehend resident violators of the Code; they also are available to the State if it is unable to apprehend nonresident licensees who violate the Code. Moreover, extradition procedures are

available for apprehending nonresident violators of the Code, as well as residents who flee the state after violating the Code's provisions. The constraints on the State's ability to apprehend nonresident licensees who violate the Code do not provide a substantial reason for prohibiting nonresidents to hold mixed beverage licenses.

As to obtaining personal jurisdiction over nonresident licensees in civil suits in state court, the State may require nonresidents to consent to jurisdiction in the state. Finally, the ability of nonresidents to remove civil suits to federal court based on diversity jurisdiction does not justify prohibiting them from obtaining mixed beverage licenses. The right of nonresident defendants to a federal forum is authorized by the Constitution and guaranteed by federal law. The Defendant's argument condemns the entire judicial structure rather than the state licensing program here at issue.

The Court finds that the Defendant has failed to establish a substantial reason for the discrimination against nonresidents seeking to obtain a mixed beverage permit, either directly as applicants or indirectly as majority shareholders of corporate applicants, and absolute prohibition against nonresidents is not substantially related to furthering any of the state's objectives.

Since the Defendant has failed to show a close relationship between the discrimination against nonresidents and any substantial state objective, the Court finds that the three-year durational residency requirement of the Texas Alcoholic Beverage Code violates the Privileges and Immunities Clause of the Constitution.

IV. CONCLUSION

Based on the foregoing, the Court finds that the Plaintiffs' challenge to the durational residency requirement for obtaining a mixed beverage license in the State of Texas is meritorious under both the Commerce Clause and Privileges and

Immunities Clause grounds. The Court, therefore, declares the provisions invalid and enjoins their enforcement.

ACCORDING, IT IS ORDERED that the three-year durational residency requirement and the Texas Alcoholic Beverage Code provisions regarding the same are hereby declared unconstitutional.

IT IS FURTHER ORDERED that the Plaintiffs' Application for a Permanent Injunction against their enforcement is GRANTED.

SIGNED AND ENTERED this 13th day of June, 1991.

/s/ JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

U.S. Const. art. I § 8.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. IV § 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. amend. XXI.

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2 The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The Wilson Act, 27 U.S.C. § 121.

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

The Webb-Kenyon Act, 27 U.S.C. § 122.

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontigous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

The Texas Alcoholic Beverage Code, 1989

Sec. 11.46. GENERAL GROUNDS FOR REFUSAL. (a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

(11) the applicant is not a United States citizen or has not been a citizen of Texas for a period of three years immediately preceding the filing of his application, unless he was issued a permit or renewal permit on or before September 1, 1948, and has at some time been a United States citizen.

Sec. 11.61. CANCELLATION AND SUSPENSION OF PERMIT.

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if its is found, after notice and hearing, that any of the following is true:

(19) the permittee is not a citizen of the United States or has not been a citizen of Texas for a period of three years immediately preceding the filing of his application, unless he was issued an original or renewal permit on or before September 1, 1948, and has been a United States citizen at some time.

Sec. 28.04 CHANGE IN COPORATE CONTROL. (a) A mixed beverage permit held by a corporation may not be renewed if the commission or administrator finds that legal or beneficial ownership of over 50 percent of the stock of the corporation has changed since the time the original permit was issued.

(b) The commission or administrator may adopt reasonable rules and regulations in accordance with the provisions of this section.

(c) A corporation which is barred from renewing a permit because of this section may file an application for an original permit and may be issued as original permit if otherwise qualified.

(d) This section does not apply to a change in corporate control:

(1) brought about by the death of a shareholder if his surviving spouse or descendants are his successors in interest; or

(2) brought about when legal or beneficial ownership of over 50 percent of the stock of the corporation has been transferred:

(A) to a person who possesses the qualifications required of other applicants for permits and is

currently an officer of the corporation and has been an officer of the corporation ever since the date the original permit was issued; or

(B) if the permittee pays a fee of $500 and notifies the commission, on completed forms and attachments prescribed by the commission, of the proposed transfer at least 10 days prior to the date the transfer is to become effective and the commission does not find that circumstances exist that would be grounds for the denial of a renewal of the permit under Section 11.46 of this code and provided the ownership of the corporation immediately after the transfer satisfies the requirements of this code. The commission may require the permittee to furnish a new bond as provided in Section 204.01(a)(3), and where a new bond is required, the permittee shall not be eligible for a bond exemption under Section 204.01(f) until 36 months after the date on which the transfer takes effect.

(e) Nothing in this section shall be construed to grant any property right to any permit or construed to prevent the commission from suspending or canceling a permit at any time after notice and hearing for a violation of this code.

Sec. 109.53. CITIZENSHIP OF PERMITTEE; CONTROL OF PREMISES; SUBTERFUGE OWNERSHIP; ETC. No person who has not been a citizen of Texas for a period of three years immediately preceding the filing of his application therefore shall be eligible to receive a permit under this code. No permit except a brewer's permit, and such other licenses and permits as are necessary to the operation of a brewer's permit, shall be issued to a corporation unless the same be incorporated under the laws of the state and unless at least 51 percent of the stock of the corporation is owned at all times by citizens who have resided within the state for a period of three years and who possess the qualifications required of other applicants for permits; provided, however, that the restrictions contained in the preceding clause shall not apply to domestic or

foreign corporations that were engaged in the legal alcoholic beverage business in this state under charter or permit prior to August 24, 1935. Partnerships, firms, and associations applying for permits shall be composed wholly of citizens possessing the qualifications above enumerated. Any corporation (except carrier) holding a permit under this code which shall violate any provisions hereof, or any rule or regulation promulgated hereunder, shall be subject to forfeiture of its charter and it shall be the duty of the attorney general, when any such violation is called to his attention, to file a suit for such cancellation in a district court of Travis County. Such provisions of this section as require Texas citizenship or require incorporation in Texas shall not apply to the holders of agent's, industrial, medicinal and carrier's permits. No person shall sell, warehouse, store or solicit orders for any liquor in any wet area without first having procured a permit of the class required for such privilege, or consent to the use of or allow his permit to be displayed by or used by any person other than the one to whom the permit was issued. It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission of the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices hereinafter declared to constitute unlawful trade practices. No applicant for a package store permit or a renewal thereof shall have authority to designate as "premise" and the commission or administrator shall not approve a lesser area than that specifically defined as "premise" in Section 11.49(a) of this code. Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful. No minor, unless accompanied by his or her parent, guardian, adult husband or adult wife, or other

adult person into whose custody he or she has been committed for the time by some court, shall knowingly be allowed on the premises of the holder of a package store permit. The prohibition against the presence of a minor on the premises of the holder of a package store permit does not apply to the presence on the premises of the holder or a person lawfully employed by the holder. Any package store permittee who shall be injured in his business or property by another package store permittee by reason of anything prohibited in this section may institute suit in any district court in the county wherein the violation is alleged to have occurred to require enforcement by injunctive procedures and/or to recover threefold the damages by him sustained; plus costs of suit including a reasonable attorney's fee. The provisions prohibiting the licensing of only a portion of a building as premise for a package store permit shall not apply to hotels as already defined in this code.

The Texas Alcoholic Beverage Code, 1993

Sec. 6.03 CITIZENSHIP REQUIREMENTS. (a) It is the public policy of this state and a purpose of this section to require that, except as provided in Subsection (k) of this section or otherwise in this code, a permit or license may not be issued to a person who was not a citizen of this state for a one-year period preceding the date of the filling of the person's application for a license or permit. In that regard, the legislature makes the findings in Subsections (b) through (j) of this section.

(b) Between 1920 and 1933, the distribution and consumption of alcoholic beverages was prohibited in the United States. While the idealistic motives behind Prohibition were noble, a law enforcement nightmare ensued. Otherwise law-abiding citizens routinely violated the law by buying and consuming alcoholic beverages. The demand for the illegal products created an opportunity for criminal elements to develop a national network for the supply and distribution of alcoholic beverages to the populace. Massive criminal empires were built on illicit profits from these unlawful activities and organized

crime openly flourished in Chicago, New York, New Orleans, and other cities.

(c) During Prohibition, the illegal enterprises used their national wholesale distribution networks to exert control over their customers. A common operating procedure was to sell alcoholic beverages to a speakeasy on liberal terms to ensnarl the owner in a web of debt and control with the aim of forcing the owner to engage in other illegal business enterprises on the premises including gambling, prostitution, and the distribution of illegal drugs.

(d) In 1935, when the sale of alcoholic beverages was legalized in this state following the adoption of the Twenty-first Amendment to the United States Constitution, the state was faced with building an entire framework for the distribution of alcoholic beverage products. An important concern was that since criminals owned and controlled the existing illegal alcoholic beverage distribution system, criminals would attempt to own and control the newly legalized industry. In an effort to prevent this situation, comprehensive laws were adopted to ensure that an alcoholic beverage permit or license could be issued only to citizens of the state who had lived in this state for at least three years, thus, long enough to be known by their community and neighbors.

(e) Under the newly designed regulatory scheme, permits and licenses issued by the state did not grant the holder a right. Rather, the holder was granted a privilege that could be challenged at both the county and the state level if the character or qualifications of the applicant were suspect. Finally, strict cash and credit laws were adopted to prevent parties in the wholesale distribution system from controlling their retail customers through the leveraging of debt to accomplish other illicit gain.

(f) The alcoholic beverage laws adopted by the legislature in the 1930s to free the industry from the influence of organized

crime have been successful in this state. The alcoholic beverage industry in this state is not dominated by organized crime. However, the legislature does find that organized crime continues to be a threat that should never be allowed to establish itself in the alcoholic beverage industry in this state.

(g) To accommodate the interests of the consuming public, the expansion of popular nationwide businesses, and the increasing state interest in tourism, and at the same time to guard against the threats of organized crime, unfair competition, and decreased opportunities for small businesses, the legislature finds that there is no longer need for the three-year residency requirements with regard to those segments of the industry that sell alcoholic beverages to the ultimate consumer only. The legislature finds that it is desirable to retain a one-year residency requirement for businesses that sell to the consumer packaged liquor and fortified wine capable of being used to supply legal or illegal bars and clubs. The legislature also finds it reasonable, desirable, and in the best interests of the state to provide a one-year residency requirement for businesses engaged in the wholesale distribution of beer, malt liquor, or wine or in the manufacture and distribution of distilled spirits and fortified wines at both the wholesale and the retail levels where those beverages, in unopened containers, are sold to mixed beverage permittees and private club registration permittees as well as to the general public. Adequate protection is deemed to be provided by controlling those sources of supply for distilled spirits and fortified wines.

(h) It is also the public policy of this state and a purpose of this section to enforce strict cash and credit laws as a means of preventing those engaged in the distribution of alcoholic beverages from exerting undue influence over any level of the industry selling or serving alcoholic beverages to the ultimate consumer.

(i) It is also the public policy of this state and a purpose of this section to maintain and enforce the three-tier system (strict

separation between the manufacturing, wholesaling, and retailing levels of the industry) and thereby to prevent the creation or maintenance of a "tied house" as described and prohibited in Section 102.01 of this code.

(j) The above-stated public policies, purposes of this section, and legislative findings are provided as guidelines for the construction of the following subsections of this section.

(k) A requirement under this code that 51 percent or more of the stock of a corporation be owned by a person or persons who were citizens of this state for a one-year period preceding the date of the filing of an application for a license or permit does not apply to a corporation organized under the laws of this state that applies for a license or permit under Chapters 25-34, Chapter 44, Chapters 48-51, Chapters 69-72, or Chapter 74 of this code if:

(1) all of the officers and a majority of directors of the applicant corporation have resided within the state for a one-year period preceding the date of the application and each officer or director posses the qualifications required of other applicants for permits and licenses;

(2) the applicant corporation and the applicant's shareholders have no direct or indirect ownership or other prohibited relationship with others engaged in the alcoholic beverage industry at different levels as provided by Chapter 102 of this code and other provisions of this code;

(3) the applicant corporation is not precluded by law, rule, charter, or corporate bylaw from disclosing the applicant's shareholders to the commission; and

(4) the applicant corporation maintains its books and records relating to its alcoholic beverage operations in the state at its registered office or at a location in the state approved in writing by the commission.

(l) Corporations subject to Subsections (k) of this section that have substantially similar ownership may merge or consolidate. A fee of $100 shall be paid to the commission for each licensed or permitted premises that it merged or consolidated into the surviving corporation. The surviving corporation succeeds to all privileges of the prior corporation that held the permits or licenses if the surviving corporation is qualified to hold the permits or licenses under this code. The purposes of this subsection, corporations have substantially similar ownership if 90 percent or more of the corporations is owned by the same person or persons or by the same corporation or corporations or if the surviving corporation has maintained an ownership interest in the merged or consolidated corporation since the date the original permit or license was issued.

Sec. 11.46 GENERAL GROUNDS FOR REFUSAL. (a) The commission or administrator may refuse to issue an original or renewal permit with or without a hearing if it has reasonable grounds to believe and finds that any of the following circumstances exists:

(11) the applicant is not a United States citizen or has not been a citizen of Texas for a period of one year immediately preceding the filing of his application, unless he was issued a permit or renewal permit on or before September 1, 1948, and has at some time been a United States citizen;

Sec. 11.61 CANCELLATION OR SUSPENSION OF PERMIT.

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(19) the permittee is not a citizen of the United States or has not been a citizen of Texas for a period of one year immediately preceding the filing of his application, unless he was issued an original or renewal permit on or before September 1, 1948, and has been a United States citizen at some time; or

Sec. 28.04 CHANGE IN CORPORATE CONTROL (a) A mixed beverage permit held by a corporation may not be renewed if the commission or administrator finds that legal or beneficial ownership of over 50 percent of the stock of the corporation has changed since the time the original permit was issued.

(b) The commission or administrator may adopt reasonable rules and regulations in accordance with the provisions of this section.

(c) A corporation which is barred from renewing a permit because of this section may file an application for an original permit and may be issued an original permit if otherwise qualified.

(d) This section does not apply to a change in corporate control:

(1) brought about by the death of a shareholder if his surviving spouse or descendants are his successors in interest; or

(2) brought about when legal or beneficial ownership of over 50 percent of the stock of the corporation has been transferred:

(A) to a person who possesses the qualifications required of other applicants for permits and is currently an officer of the corporation and has been an officer of the corporation ever since the date the original permit was issued; or

(B) if the permittee pays a fee of $500 and notifies the commission, on completed forms and attachments prescribed by the commission, of the proposed transfer at least 10 days prior to the date the transfer is to become effective and the commission does not find that circumstances exist that would be grounds for the denial of a renewal of the permit under Section 11.46 of this code and provided the ownership of the corporation immediately after the transfer satisfies the requirements of this code.

(3) Nothing in this section shall be construed to grant any property right to any permit or construed to prevent the commission from suspending or canceling a permit at any time after notice and hearing for a violation of this code.

NOTE: Amendment to Sec. 28.04(d)(2)(B), effective January 1, 1994. (Acts of the 73rd Legislature, Regular Session, 1993.)

Sec. 109.53. CITIZENSHIP OF PERMITTEE; CONTROL OF PREMISES; SUBTERFUGE OWNERSHIP; ETC. No person who has not been a citizen of Texas for a period of one year immediately preceding the filing of his application therefore shall be eligible to receive a permit under this code. No permit except a brewer's permit, and such other licenses and permits as are necessary to the operation of a brewer's permit, shall be issued to a corporation unless the same be incorporated under the laws of the state and unless at least 51 percent of the stock of the corporation is owned at all times by citizens who have resided within the state for a period of one year and who possess the qualifications required of other applicants for permits; provided, however, that the restrictions contained in the preceding clause shall not apply to domestic or foreign corporations that were engaged in the legal alcoholic beverage business in this state under charter or permit prior to August 24, 1935. Partnerships, firms, and associations applying for permits shall be composed wholly of citizens possessing the qualifications above enumerated. Any corporation (except carrier) holding a permit under this code which shall violate any

provisions hereof, or any rule or regulation promulgated hereunder, shall be subject to forfeiture of its charter and it shall be the duty of the attorney general, when any such violation is called to his attention, to file a suit for such cancellation in a district court of Travis County. Such provisions of this section as require Texas citizenship or require incorporation in Texas shall not apply to the holders of agent's, industrial, medicinal and carrier's permits. No person shall sell, warehouse, store or solicit orders for any liquor in any wet area without first having procured a permit of the class required for such privilege, or consent to the use of or allow his permit to be displayed by or used by any person other than the one to whom the permit was issued. It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission of the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices hereinafter declared to constitute unlawful trade practices. No applicant for a package store permit or a renewal thereof shall have authority to designate as "premise" and the commission or administrator shall not approve a lesser area than that specifically defined as "premise" in Section 11.49(a) of this code. Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful. No minor, unless accompanied by his or her parent, guardian, adult husband or adult wife, or other adult person into whose custody he or she has been committed for the time by some court, shall knowingly be allowed on the premises of the holder of a package store permit. The prohibition against the presence of a minor on the premises of the holder of a package store permit does not apply to the presence on the premises of the holder or a person lawfully

employed by the holder. Any package store permittee who shall be injured in his business or property by another package store permittee by reason of anything prohibited in this section may institute suit in any district court in the county wherein the violation is alleged to have occurred to require enforcement by injunctive procedures and/or to recover threefold the damages by him sustained; plus costs of suit including a reasonable attorney's fee. The provisions prohibiting the licensing of only a portion of a building as premise for a package store permit shall not apply to hotels as already defined in this code.